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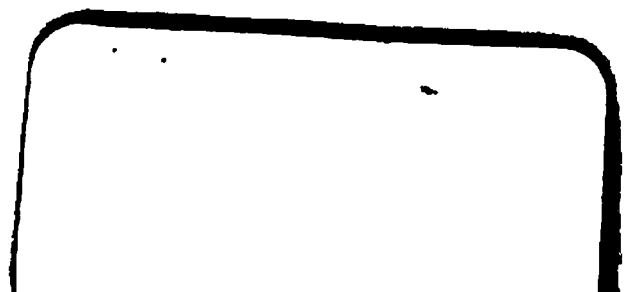

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V

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

EASTER TERM, 1845, TO EASTER TERM, 1846.

BY ALFRED DOWLING,

SERJEANT AT LAW,

AND JOHN JAMES LOWNDES,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. III.

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A

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ERRATA.

Ante, vol. 2, p. 94, line 7, *for* "merely," *read* "mainly."
Ante, vol. 2, p. 111, marginal note, after the words "central criminal," *dele* "Court."
Ante, vol. 2, pp. 692, 3, notes (*b*) and (*d*), *for* "3 Price, 221," *read* "2 Price, 166."
✓ p. 309, cancel the marginal note to Bevins *v.* Hulme, and substitute that given at p. 722.
✓ p. 314, line 11, *for* "defendant," *read* "plaintiff."
line 16, *for* "debts retained were," *read* "defendant's retainer was."
✓ p. 474, *for* "Baker *v.* Jupp," *read* "Beeton *v.* Jupp."
✓ p. 697, marginal note, line 11, *after* "render," *insert* "invalid."
✓ p. 734, marginal note, lines 8 and 10, *for* "defendants," *read* "defendant."

REPORTS OF CASES

DETERMINED ON

POINTS OF PRACTICE.

COURT OF COMMON PLEAS.

Easter Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

Sc. - 1 - CB. 117.

ROBERTS *v.* TAYLER and Others.

1845.

To a declaration of trespass quare clausum fregit, containing a count for an assault; the defendants pleaded, inter alia, lib. tenem. in J. W., and a justification, on that ground, of the trespass, and that because the plaintiff "was unlawfully in possession," the defendants, as servants of J. W., and by his command, ejected her; and in so doing, because she resisted, committed the assault. The plaintiff replied that she was lawfully possessed, and was lawfully entitled to her possession as against the defendants; with a special traverse, that the plaintiff was unlawfully in possession or occupation: *Held*, on special demurrer to the replication, that the plea was substantially one of liberum tenementum, and therefore bad, as attempting to justify an assault.

The declaration also contained a count de bonis asportatis. The defendant pleaded inter alia, lib. tenem. in J. W., and that J. W. leased the premises to the plaintiff, with a proviso for re-entry for non-repair: that the premises were out of repair, and that the defendants entered as the servants of J. W., and because the plaintiff was unlawfully in possession, &c. (as in the above plea); and also justifying the removal of the goods of the plaintiff, which were wrongfully placed on the premises, to a convenient distance, doing no damage to the same. The plaintiff replied as to so much of the plea as related to the last count in the declaration, that after the removal of the goods, the defendants converted them to their own use: *Held*, on special demurrer, that the replication was good.

TRESPASS. For that the defendants, before the commencement of this suit, to wit, on the third day of January, in the year of our Lord one thousand eight hundred and forty-four, and on divers and very many other days and times between that day and the commencement of this suit, with force and arms, &c., broke and entered a certain dwelling-house of the plaintiff, situate and being, to wit, in

1845.

ROBERTS v. TAYLER and Others.

the parish of Saint Leonard, Shoreditch, in the county of Middlesex, and long known by the description of number eleven, Winkworth Buildings, City Road; there and then made a great noise and disturbance therein; and stayed therein making such noise and disturbance for divers long spaces of time respectively next after the said times when they so broke and entered the said dwelling-house, to wit, for the space of three days next after each of these times: And also for that the defendants, before the commencement of this suit, to wit, on the eighth day of January, in the year of our Lord one thousand eight hundred and forty-four, with force and arms, &c., amoved from the said dwelling-house of the plaintiff divers fixtures and things of the plaintiff then affixed thereto and belonging to the same, to wit, ten stoves, &c., of the value, to wit, of five hundred pounds, and then seized, took, and carried away the same, and converted and disposed thereof to their own use: And also for that the defendants, before the commencement of this suit, to wit, on the eighth day of January, in the year of our Lord one thousand eight hundred and forty-four, with force and arms, &c., ejected, expelled, put out and amoved the plaintiff from her possession and occupation of her said dwelling-house, and kept and continued her so expelled, amoved and put out thereof, up to and at the time of the commencement of this suit, and during such time took and had, and received to the use of the defendants, all the issues and profits of the said dwelling-house, being of great yearly value, to wit, of the yearly value of one hundred pounds, and caused and procured great damage, deterioration and injury, to the said dwelling-house: And also for that the defendants, before the commencement of this suit, to wit, on the eighth day of January, in the year of our Lord one thousand eight hundred and forty-four, and on divers and very many other days between that day and the commencement of this suit, and several times on each of those days, with force and arms, &c., assaulted the plaintiff, and then beat, bruised, wounded,

bit, and ill treated her: And also for that the defendants, with force and arms, before the commencement of this suit, to wit, on the third day of January, in the year of our Lord one thousand eight hundred and forty-four, seized and took divers goods and chattels of the plaintiff, to wit, thirty tables, &c., and two thousand other goods and chattels of great value, to wit, of the value of three hundred pounds, and then converted and disposed of the same to their own use, to the damage, &c.

Fourth plea. And for a further plea to the whole of the said declaration, the defendants say that the said dwelling-house in which, &c., at the said times when, &c., in the declaration mentioned, was, and now is the dwelling-house, soil, and freehold of one J. W.; wherefore the defendants, as the servants of the said J. W., and by his command in that behalf, at the said times when, &c., in the said declaration mentioned, broke and entered the said dwelling-house in which, &c., and committed therein the said several supposed trespasses in the said first count mentioned: and the said fixtures and things, in the said second count mentioned, were, at the said time, when, &c., part and parcel of the said dwelling-house, and of the said J. W.'s said freehold therein: and the plaintiff, just before, and at the said times when, &c., in the said third and fourth counts mentioned (to wit) on the said 8th day of January in the year of our Lord, one thousand eight hundred and forty-four, was unlawfully in possession and occupation of the said dwelling-house, and with force and arms, making a great noise and disturbance therein without the leave or license, and against the will of the said J. W.; the defendants, thereupon, as the servants of the said J. W., and by his command in that behalf, then requested the plaintiff to cease making her said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do; whereupon the defendants, as the servants of the said J. W., and by his command, in the defence of his possession of the said dwelling-house,

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gently laid their hands on the plaintiff in order to eject, expel, put out and remove, and did then eject, expel, put out, and remove her from her possession and occupation of and from and out of the said dwelling-house; and because she, the plaintiff, then resisted the defendants in that behalf, and then assaulted the defendants, and used violent and menacing language and gestures towards the defendants, and would then and there have beaten, bruised, wounded, and ill treated them, if they had not defended themselves against the plaintiff; they, the defendants, at the said times when, &c., did defend themselves against the plaintiff, and in so doing did necessarily and unavoidably assault the plaintiff, and then a little beat, bruise, wound, bite, and ill treat her, doing no unnecessary damage to the plaintiff on the occasions aforesaid: and because the said goods and chattels in the said last count mentioned, before and at the said time when, &c., in that count mentioned, had been wrongfully put and placed, and then were wrongfully in and upon the said dwelling-house in which, &c., encumbering the same and doing damage there to the said J. W., the defendants as the servants of the said J. W., and by his command in that behalf, at the said time when, &c., in that count mentioned, seized the said goods and chattels, and took and amoved them from the said dwelling-house in which, &c., to a small and convenient distance, and there left the same for the plaintiff's use; whereof the plaintiff then had notice: which are the said several supposed trespasses in the declaration mentioned. Verification.

Eighth plea. And for a further plea in this behalf to the first, third, and subsequent counts of the said declaration, the defendants say that long before the plaintiff was possessed of, or had any title, estate, or interest in the said dwelling-house, in which, &c., to wit, on the thirty-first day of March, in the year of our Lord one thousand eight hundred and thirty-seven, the said Josiah Wilson was seised in his demesne as of fee, of and in the said dwelling-house in which, &c., and being so seised before the

said times, when, &c., in the said first, third, and subsequent counts mentioned, or any of them, and before the plaintiff was possessed of, or had any estate, interest, or title of, in, or to the said dwelling-house, to wit, on the thirty-first day of March, in the year of our Lord one thousand eight hundred and thirty-seven, by a certain agreement then made between the said Josiah Wilson and the said Robert Roberts, the date whereof is the day and year last aforesaid, the said Josiah Wilson agreed to let, and did let to the said Robert Roberts, who then agreed to take, and did take the said dwelling-house in which, &c., as tenant thereof to the said Josiah Wilson, for one year then next following, and so on from year to year for so long as they should respectively please, the first year to commence from the twenty-fifth day of March then last past, at and under the yearly rent of fifty-five pounds, payable quarterly on the twenty-fourth day of June, the twenty-ninth day of September, the twenty-fifth day of December, and the twenty-fifth day of March in each and every year, by even and equal portions, and the said Robert Roberts thereby agreed with the said Josiah Wilson, to repair and keep in tenantable repair the said dwelling-house during the continuance of the said demise and tenancy; and it was thereby further agreed that if the said Robert Roberts should break the said agreement in any respect, or if he did not repair or keep in tenantable repair the said dwelling-house during the continuance of the said demise and tenancy, or if the said rent, or any part thereof should be unpaid fourteen days next after any day on which such rent, or any quarterly part thereof, should become due, then it should be lawful for the said Josiah Wilson to enter on the said dwelling-house without any ejectment or process at law, and to have again, and re-possess the same, and all occupiers thereof to expel and remove; by virtue of which said agreement and demise, the said Robert Roberts then entered into and upon the said dwelling-house, and became and was possessed thereof for the said

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term and tenancy so to him thereof granted as aforesaid; the reversion of and in the said dwelling-house, then, and during all the time hereafter-mentioned, being in the said Josiah Wilson: and the defendants aver that afterwards, and during the continuance of the said demise and tenancy, to wit, on the twenty-fifth day of December, in the year of our Lord one thousand eight hundred and forty-three, and before the said times, when, &c., the said Robert Roberts wholly omitted and neglected to, and did not nor would repair and keep in tenantable repair the said dwelling-house, and the said dwelling-house was then suffered and permitted to be, and the same then was in bad and untenantable repair by reason of the same not being repaired and kept in tenantable repair according to the said agreement; and the same continuing in such bad and untenantable repair, by reason of the premises thereupon it then, and at the said times when, &c., in the said first, third, and subsequent counts mentioned, became and was lawful for the said Josiah Wilson under and by virtue of the said agreement, to enter upon the said dwelling-house without any ejectment or process at law, and to have again and re-possess the same, and all occupiers thereof to expel and remove, and the said estate and interest of the said Robert Roberts, and all those claiming under him under and by virtue of the said agreement, became and was by means of the premises forfeited and wholly ended and determined, and thereupon afterwards, and at the said times, when, &c., in the said first, third, and subsequent counts mentioned, they, the defendants, as servants of the said Josiah Wilson, and by his command in that behalf for and by reason of the said breach of the said agreement did in pursuance, and under and by virtue of the said agreement and the said power therein contained, enter into and upon the said dwelling-house the outer door thereof being open, and did take possession thereof, and the same again have and re-possess for and on behalf of the said Josiah Wilson, and by his command in that be-

half; and because the plaintiff was unlawfully, at the said times, when, &c., in the occupation and possession of the said dwelling-house without the leave or license and against the will of the said Josiah Wilson, the defendants thereupon, as the servants of the said Josiah Wilson, and by his command in that behalf, then requested the plaintiff to go and depart from and out of the said dwelling-house, which the plaintiff then wholly refused to do, whereupon the defendants, as the servants of the said Josiah Wilson, and by his command in that behalf, in the defence of his possession of the said dwelling-house, gently laid their hands on the plaintiff, in order to eject, expel, put out and amove, and did then eject, expel, put out and amove her from her possession and occupation of and from and out of the said dwelling-house; and because the plaintiff then resisted the defendants in that behalf, and then assaulted the defendants, and used violent and menacing language and gestures toward them, and would then and there have beaten, bruised, wounded, and ill-treated them, if they had not defended themselves against the plaintiff; they the defendants, at the said times when, &c., in the said fourth count mentioned, did defend themselves against the plaintiff, and in so doing did necessarily and unavoidably assault the plaintiff, and did then a little beat, bruise, wound, bite and ill treat her, doing no unnecessary damage to the plaintiff on the occasions aforesaid: and because the said goods and chattels in the said last count mentioned, before and at the said time when, &c., in that count mentioned had been wrongfully put and placed, and then were wrongfully in and upon the said dwelling-house in which, &c., encumbering the same, and doing damage there to the said Josiah Wilson, the defendants, as the servants of the said Josiah Wilson, and by his command in that behalf at the said time when, &c., in that count mentioned, seized the said goods and chattels, and took and amoved them from the said dwelling-house in which, &c., to a small and convenient distance, and there

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left the same for the plaintiff's use, and whereof the plaintiff then had notice; which are the said several supposed trespasses, &c. Verification.

Replication: And the plaintiff, as to the plea of the defendants by them fourthly above pleaded, so far as relates to the said first count says, that at the said times when, &c., in the said first count mentioned, the plaintiff was lawfully possessed of the said dwelling-house in which, &c., and was lawfully entitled to her possession thereof as against the defendants; without this that the plaintiff was unlawfully in possession or occupation of the said dwelling-house in which, &c., in manner and form as in the said fourth plea so far as relates to the said first count in that behalf is alleged; and this the plaintiff prays may be inquired of by the country, &c.

There were similar replications to so much of the fourth plea as related to the second and third counts of the declaration.

As to so much of the fourth plea as related to the last count, the plaintiff replied, that after the defendants seized the goods and chattels in the said last count mentioned, and took and amoved the same, in the manner in the said fourth plea in that behalf mentioned, to wit, at the said time when, &c. in the said last count in the behalf mentioned, the defendants converted and disposed of the said goods and chattels to their own use in manner and form as in the said last count is alleged. Verification.

Replication to the eighth plea, so far as the same related to the last count in the declaration, in the same terms, mutatis mutandis, as the replication to the fourth plea to the same count.

To each of these replications the defendants demurred specially: assigning for cause to the replications to so much of the fourth plea as related to the first, second, and third counts; that it did not appear in or by the said replications how or why the plaintiff was lawfully possessed of the said dwelling-house; that it should have been therein alleged

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what right and title the plaintiff had to her possession of the said dwelling-house; that the replications should have traversed that the said dwelling-house in which, &c. was the dwelling-house, soil and freehold of the said Josiah Wilson, or should have set forth and shewn what right or title the plaintiff had therein, shewing the facts under which she derived such right or title; that the replications traverse immaterial matter; that the replications amount to an argumentative traverse of the defendants having been the servants of the said Josiah Wilson, and having acted by his command, as alleged in the said plea; and that the replications put in issue matters of law and matters not properly triable by a jury; namely, whether or not the plaintiff was unlawfully in possession or occupation of the said dwelling-house: and as to so much of the replication to the fourth plea, and so much of the replication to the eighth plea, as related to the last count of the declaration: that the replications did not sufficiently confess and avoid or traverse or deny the matters alleged in the fourth and eighth pleas, so far as those pleas relate to the said last count; that if the replications were meant as a denial of the defendants having removed the said goods and chattels to a small and convenient distance, and there leaving the same for the use of the plaintiff, it is an argumentative traverse thereof only, and should have concluded to the country and not with a verification; that if the replications were meant to confess and avoid the said matter in the fourth and eighth pleas, so far as relates to the last count, it was a departure from the declaration; inasmuch as it admitted that the action was brought for the purpose in the fourth and eighth pleas mentioned, and that so much of the fourth and eighth pleas as related to that count was an answer thereto, and at the same time sought and endeavoured to set up and establish another and different cause of action; that the replications, if it were intended to set up that the defendants were trespassers by or from the original seizing and taking of the goods and chattels, should have

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shewn how they were so; that it was uncertain and ambiguous from the replications whether the plaintiff intended to rely upon the seizing and taking of the goods and chattels as a cause of action; that the replications were a new assignment, but were, nevertheless, improperly and inartificially pleaded as such, and were informal; and that the replications should have commenced as a new assignment, and contained the usual and proper allegations of a new assignment, &c.

Channell, Serjt., in support of the demurrers. The defendants submit that the replications are bad. The plaintiff has chosen to treat the defendants' pleas, as if they were simply pleas of not possessed; but they are clearly pleas of liberum tenementum as regards some of the counts, and are sufficient pleas to the rest. The plaintiff should have taken issue on the allegation, that it was the soil and freehold of J.W.; or else should have shewn some interest which she possessed, consistent with that allegation. It may be contended by the plaintiff, that the allegation in the pleas, that the plaintiff was unlawfully possessed, renders them in point of fact pleas only of not possessed. But that is not so, the very object of the pleas is to shew, that the plaintiff was in possession, but wrongfully; and, therefore, the defendants were justified in turning her out. [*Erle*, J.—The actual possession of a wrong doer, is no possession at all in the legal sense of that word.] These are substantially pleas of liberum tenementum; but as the defendants could not under that defence alone, have justified the assault; they, therefore, shew besides, that the plaintiff was wrongfully in possession. [*Tindal*, C. J.—The defendants have undertaken to answer too much in their pleas; and, therefore, when they come to the assault, the only way they have of treating it, is to justify under a defence of possession. *Maule*, J.—If you were to strike out all of the pleas, except liberum tenementum, then the pleas would be bad; because they would not answer the assault, to which liberum tene-

mentum would afford no answer.] If these are pleas professing to answer the whole declaration, and they answer only a part, the plaintiff should have demurred.

Talfourd, Serjt., contrà. The replications are good. If these pleas are to be taken substantially as pleas of liberum tenementum, they are, undoubtedly bad, as attempting to justify an assault. If, on the contrary, they are pleas of not possessed, the replications are sufficient.

Channell, Serjt., in reply. The pleas, perhaps, might be bad on special demurrer, for attempting to answer too much. The eighth is, at all events, a sufficient justification of all but the assault.

TINDAL, C. J.—It seems to me that the eighth plea must follow the fate of the fourth. And, as to the fourth, as the defendants have thought fit to introduce in their justification the seisin in fee in Wilson, the plaintiff has a right to see whether or not it affords a good answer to the assault. I am not aware of any instance in which a plea of liberum tenementum has been held to be a good defence to an action of assault. The ordinary answer to such an action is, that the assault was committed in defence of defendant's possession. The plea of liberum tenementum at most only implies a possession. I think the plea is bad.

MAULE, J., concurred.

CRESSWELL, J.—In an action of trespass quare clausum fregit, the possession of the plaintiff is the foundation of the action; and it has long been held, that the defendant sufficiently admits primâ facie the possession of the plaintiff, by the plea of liberum tenementum. The plaintiff is then put either to deny that the soil is the freehold of the defendant, or else to set up a right in himself, consistent

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with that plea. But in an action of personal trespass, the defendant must shew a right to the possession as well as to the freehold.

ERLE, J., concurred.

On a subsequent day, *Channell*, Serjt., directed the attention of the Court to the allegation of entry in the eighth plea.

TINDAL, C. J.—That only shifts the objection to the replication. The eighth plea is pleaded as to the first, third, fourth and fifth counts of the declaration. The replication denies so much of the plea as relates to the last count. We have already decided in favour of the plaintiff, on the ground that the fourth plea was bad; and we now decide that he is entitled to our judgment also as to the eighth plea, on the ground that the replication is good; as averring facts, that if proved, would shew the defendants were trespassers ab initio.

Judgment for the Plaintiff (*a*).

(*a*) This case was decided in Hilary Term; but has been hitherto unavoidably postponed.

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C. 1. C.B. 636.

CHANNELL, Serjt., shewed cause against a rule calling upon the plaintiff to shew cause why the declaration which had been filed in this case, and all subsequent proceedings, should not be set aside for irregularity, with costs. It appeared from an affidavit on the part of the defendant, that he had never been served with a copy of the writ of summons, and that he had not received any notice of the proceedings against him, until after an appearance had been entered for him by the plaintiff. It was now contended, that the form in which the rule was moved was incorrect, and that the defendant ought to have moved to set aside the appearance, if improperly entered; inasmuch as while the appearance remained untouched, the filing of the declaration and other subsequent proceedings were regular.

Where an appearance has been entered by the plaintiff for the defendant, without personal service of the writ of summons, and a declaration has been filed, the defendant should move to set aside the appearance, and not the declaration.

A motion to set aside the declaration alone, is irregular.

4 Dowl. 307 - 740.

Shee, Serjt., in support of the rule, argued that the appearance was a nullity, not having been properly entered, and that, consequently, the declaration and other subsequent proceedings were irregular.

TINDAL, C. J.—It appears to me that this rule has been moved informally, and, therefore, that it ought to be discharged. The defendant ought to have moved to set aside the appearance to the process on which the subsequent proceedings have been founded. In *Hasker* v. *Jarmaine* (*a*), the writ, not being dated on the face of it, pursuant to stat. 2 Wm. 4, c. 39, s. 1, sched. No. 1, was irregular, but the service was regular, and the defendant having obtained a rule to set aside the service of the writ, the Court of Exchequer discharged the rule, and *Bayley*, B., observed, "We cannot say that the proceedings are more irregular than you state them to be. We cannot get at the writ to

(*a*) 1 C. & M. 408; See S. C. 1 Dowl. 654.

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say whether it is regular or irregular. If you had applied to set aside the writ, we should have had no difficulty." So, in *Edwards* v. *Danks* (*a*), where the action was brought on a bail bond, the objection was that there had been no default in the original action. The defendant obtained a rule to set aside the service of the writ of summons, but Lord *Abinger*, C. B., said, "The motion should have been to set aside the writ itself. This motion supposes a defect in the service which does not exist." In the present case, so long as the appearance stands good, the declaration is regularly filed, and, therefore, we cannot set it aside. The motion should have gone higher.

Rule discharged.

(*a*) 4 Dowl. 357.

SC. 1 CB - 464

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A commission to examine witnesses on interrogatories and cross-interrogatories, was sent out to Belfast, the commissioners being empowered "to put, or cause to be put, additional questions, when it should appear to them to be necessary and proper." The defendant, when before the commissioners, abandoned some of his cross-interrogatories, and proposed to put additional questions, to which the plaintiff objected. The commissioners proceeded with the examinations on such questions "subject to the objections." At the trial, the answers to these questions were ruled to be inadmissible in evidence: *Held*, that the ruling was right, as the commissioners ought themselves to have decided whether the questions were necessary and proper to be put, and not to have left that question for the determination of the Court.

ASSUMPSIT for work and labour. At the trial before *Cresswell*, J., at the Summer Assizes at Liverpool, 1844, it appeared that a commission had been sent to examine witnesses on interrogatories at Belfast, in Ireland, two out of the four commissioners having been appointed on the part of the plaintiff, and two on the part of the defendant. The commission, after giving the usual power to examine and cross-examine on interrogatories, contained the following provision:—"That the said commissioners may put or cause to be put additional questions, when it shall appear to them, the said commissioners, to be necessary and proper; such questions to be put down in writing, and returned with the answers, together with the interroga-

tories and answers under the said commission; and that each party be at liberty to cross-examine on interrogatories." In the course of the examinations taken before the commissioners at Belfast, the defendant abandoned several of the cross-interrogatories which had been exhibited on his behalf, and demanded that additional questions should be put, and on the examination of his own witnesses proposed to act in the same manner. With respect to these additional questions the commissioners returned, "that the plaintiff had objected to the defendant's right to adopt this course," and that "subject to these objections, they had proceeded with the examination of the witnesses on such additional questions." An objection was raised at the trial, on the part of the plaintiff, to the admissibility of the answers to these additional questions in evidence, and the learned Judge ruled that they could not be received. A verdict having passed for the plaintiff, a rule nisi was obtained in Michaelmas Term last for a new trial, on the ground that the evidence tendered was improperly rejected.

Murphy, Serjt., (with whom was *F. Robinson*) now shewed cause against the rule.

Channell, Serjt., contrà.

The arguments are sufficiently adverted to in the judgments delivered.

TINDAL, C. J.—In this case the commissioners had, in the first instance, the ordinary authority to examine the witnesses on certain interrogatories, as well on the part of the defendant as of the plaintiff; and if the matter had stopped there, they would have had no authority or discretion to put any other questions than such as were contained in those interrogatories. A further power, however, was given them by the commission "to put or cause to be put additional questions, when it shall appear to them, the said commissioners, to be necessary and proper;" the

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object being to enable the commissioners by putting such additional questions, to elucidate the difficulties which might arise pro re natâ. It is clear, therefore, that the commissioners had a discretion, and the question is, whether they exercised it? It appears to me that they have not come to any judgment or decision upon the subject, but have left it to the Court to say, whether the questions ought to have been put or not. It is the parties' own act that these commissioners were appointed. It was not necessary that, in point of form, the questions should have been put by the commissioners themselves; if they had adopted them, when suggested by the agents for the parties on either side, that would have been a virtual compliance with the power given by the commission. The commissioners, however, do not say that the questions shall be put, or that they shall not be put, but that, subject to the objections made, the examination shall be proceeded with. They had no right to reserve for our consideration the propriety of putting these questions, and, therefore, the answers could not be given in evidence, and the verdict ought to stand.

COLTMAN, J.—Whether the questions were fit to be put or not, is not a matter for our decision, but whether the commissioners have exercised the jurisdiction which they undoubtedly possessed, in putting such additional questions as appeared to them necessary and proper. It seems to me, that they have not exercised any discretion on the subject.

ERLE, J.—I also am of opinion that the evidence was properly rejected, and that the verdict ought to stand. At the time of the examination, the defendant claimed a right to put additional cross-interrogatories. Now, the commissioners had no power to put them as the cross-interrogatories of the defendant, but they had a power to put them as questions of their own, and if they had so resolved,

and had so put them, the answers would have been admissible in evidence. I quite agree that the questions were extremely reasonable to be put, if the commissioners had put them as their own; but as they did not think it necessary or proper so to do, the learned Judge was quite right in refusing to receive the answers as evidence.

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Rule discharged.

ROAKES *v.* MANSER and Others.

8 C. & P. 631.

DEBT. The plaintiff declared against the defendants, as executors of William Manser, upon a bond for 1000*l.* given by their testator to the plaintiff. The defendants craved oyer of the bond, which was the joint and several bond of Frederick Barry, James Barry, and William Manser, and set out the condition thereof, providing that the bond should be void, "if the above-bounden Frederick Barry, James Barry, and William Manser, their heirs, executors, administrators, or assigns, do and shall well and truly pay or cause to be paid unto the above-named Edward Roakes (the plaintiff) his executors, administrators, or assigns, the sum of 1000*l.*, on or before the 30th day of September now next ensuing, together with interest for the same, after the rate of 4*l.* 10*s.* per cent. per annum, without any deduction, defalcation, or abatement whatsoever, according to, and in full performance and discharge of the proviso or condition mentioned in a certain indenture of assignment, bearing even date with these presents, made or mentioned to be made between the above-bounden Frederick Barry, of the one part, and the said Edward Roakes, of the other part; and do also well and truly observe, perform, fulfil, and keep all and singular the covenants, grants, articles, conditions,

Plaintiff declared in debt on a bond, conditioned for the payment of 1000*l.* on a day certain, in pursuance of the terms of an indenture of even date therewith; and for the performance of the covenants contained in that indenture. The defendants pleaded generally performance of all things mentioned in the condition. The replication denied the payment of the sum of 1000*l.* modo et formâ, and concluded to the country: *Held*, upon special demurrer to the replication, that its conclusion was proper; since to make the plea good, it must be taken to allege that the money was paid on the day mentioned in the condition.

Semble, that the plea would have been bad on special demurrer, if not on general demurrer.

 6 C. & P. 280.

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and agreements whatsoever, which on his and their parts and behalfs, are or ought to be observed, performed, fulfilled, and kept, comprised and mentioned in the said recited indenture." The plea then averred that the said Frederick Barry and James Barry, and the said William Manser in his lifetime, and the defendants, as executors as aforesaid, after the death of the said William Manser, did from time to time, and at all times, after the making of the said writing obligatory and the said conditions thereof, well and truly observe, perform, fulfil, and keep all and singular the articles, clauses, conditions, agreements, matters, and things in the said conditions of the said writing obligatory comprised and mentioned, in all things therein contained, on their parts and behalf, and on the part and behalf of each and every of them, to be observed, performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory.

Replication. That the said Frederick Barry, James Barry, and William Manser, in his lifetime, and the said Frederick Barry, James Barry, and the defendants since the death of the said William Manser, did not pay the said sum of 1000*l.* in the said condition mentioned, in manner and form as in the said plea mentioned. Conclusion to the country.

Special demurrer to the replication, assigning, among other causes of demurrer, that the replication ought not to have concluded to the country, but with a verification, inasmuch as it was not a mere traverse of matter alleged, but contained new matter.

Byles, Serjt., for the defendants. The replication ought not to have concluded to the country, either at common law, or since the passing of the stat. 8 & 9 Wm. 3, c. 11. The plea is a general plea of performance, and there can be no issue taken on such a plea; *Sayre* v. *Minns* (*a*).

(*a*) Cowp. 575.

The plaintiff, therefore, at common law, ought to have assigned a breach of the condition, and to have concluded with a verification. [*Cresswell*, J.—Have you any precedent where a plea of general performance has been held to be a plea of payment of money on a certain day?] In *Com. Dig.* tit. "Pleader," (2 V. 13) it is laid down that "in debt upon a bond for performance of covenants, if all the covenants are in the affirmative, the defendant may plead covenants performed generally." It would appear from the case of *Hayman* v. *Gerrard* (*a*), that the plaintiff ought to have assigned a breach. That was an action upon a bond conditioned for rendering an account of the goods of a deceased person, and making an equal dividend and paying it; to which the defendant pleaded that no goods of the deceased came to his hands. The replication was, that a silver bowl came to his hands; and the Court held, upon general demurrer, that the replication was bad, because the plaintiff had not shewn a breach in it. The true distinction between those cases where it is necessary to assign a breach in the replication, and where not, seems to be taken by *Holt*, C. J., in the case of *Meredith* v. *Alleyn* (*b*): "In all cases (that of a bond to perform an award excepted), if the defendant pleads a special matter, that admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a non-performance, supposes it; and the plaintiff need not shew that which the defendant hath supposed and admitted; but if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach; for then he has not a cause of action unless he shew one." In *Plomer* v. *Ross* (*c*), the rule thus laid down by *Holt*, C. J., was carried still further. That was an action of debt on a bond conditioned for the performance of covenants. The defendant craved oyer of the condition,

(*a*) 1 Saund. 99, a.
(*b*) 1 Salk. 138.
(*c*) 5 Taunt. 386; See S. C. 1 Marsh. 95.

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and then pleaded performance of each covenant specially, and also a plea of general performance. The plaintiff merely took issue on the plea of general performance, and entered a separate assignment of breaches on the record, and in this state the record went down for trial. After verdict for the plaintiff, the Court held that no damages could be assessed on the breaches, and a repleader was awarded. That case is a decisive authority to shew that a replication like the present, is bad both at common law, and since the statute of William the Third. [*Cresswell*, J., referred to *Bush* v. *Leake* (*a*).] In that case, as well as in *Darbishire* v. *Butler* (*b*), which will probably be referred to on the other side, the plaintiff took issue in the words of the plea, but that has not been done here. [*Tindal*, C. J.—Is the plea good?] If there be any defect in the plea, it has been cured by the plaintiff's pleading over.

Channell, Serjt., (*Bramwell*, with him) contrà. Either the plea in this case is bad, or the replication is good. It is submitted, in the first place, that the plea must be bad, unless it allege, either expressly or by implication, the payment of this sum of money, according to the terms of the condition. Taking it to contain such an allegation, then the general rule of pleading will apply, that the plaintiff may traverse anything alleged or implied in the plea that is material, and conclude to the country. *Sayre* v. *Minns* (*c*), does not affect the present question. The plea as to the negative covenants in that case was special, that the party had not done the acts which it was covenanted he should not do, following the words of each particular covenant; and as to the affirmative covenants performance was pleaded generally. In replying, therefore, to such a plea, the plaintiff was obliged to introduce new matter, which the defendant had a right to answer. The

(*a*) 3 Doug. 255.
(*b*) 5 Moore, 198.
(*c*) Cowp. 575.

decision of the Court, therefore, that the replication must conclude with a verification, was in that case correct; but it is no authority for the argument urged on behalf of the present defendants. The cases of *Bush* v. *Leake* (*a*), and *Darbishire* v. *Butler* (*b*), which are in point for the plaintiff, have been confirmed by this Court in *Smith* v. *Bond* (*c*).

Byles, Serjt., in reply, referred to *Plomer* v. *Raine* (*d*), and *Hedges* v. *Sandon* (*e*).

TINDAL, C. J.—It appears to me that the replication in this case is good. The action is brought on a bond, of which the condition is set out on oyer, and is a condition to perform two several and distinct matters and things. One of these things is to pay a certain sum of money on or before a given day, with interest, in performance of the proviso or condition mentioned in a certain indenture of assignment referred to by the condition of the bond. This is one act, which the defendants' testator, whom they represent, was bound to perform. The other act is, that he shall also well and truly observe, perform, fulfil, and keep all and singular the covenants, grants, articles, conditions, and agreements whatsoever, covenanted to be performed by him in the same indenture. Now in order to plead performance of this condition, the way in which the defendants ought to have proceeded, was to have followed the words of it, and to have alleged that their testator did pay the money; and then to have pleaded generally that the testator in his lifetime, and they, as his executors, after his death, did well and truly keep the covenants, &c., according to the true intent and meaning thereof. Instead, however, of doing that, they have pleaded that the testator in his lifetime, and they, since his death, did observe and perform all the matters and things in the said condition comprised and

(*a*) 3 Doug. 255.
(*b*) 5 Moore, 198.
(*c*) 10 Bing. 125; See S. C. 3 M. & Scott, 528.
(*d*) 4 East, 344, note (*f*).
(*e*) 2 T. R. 439.

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mentioned. I say that, in strictness, they ought not to be allowed so to plead; because in *Com. Dig.* tit., "Pleader," (2 W. 33) the rule is thus laid down: "If the condition of the bond be to do several things, the defendant cannot plead performance generally, though all are in the affirmative, but shall answer specially to every particular;" and for this are cited as authorities, 1 *Lev.* 303; *Kel.* 95 b.; 1 *Sid.* 215. If, therefore, this had been a proper plea of performance of the condition of this bond, it would have contained a distinct allegation that the money was paid to the plaintiff on the day specified, which it does not. Let it be allowed that it is too late now for the plaintiff to take advantage of that objection, still, at the same time, he ought not to be placed in a worse position than if the defendants had pleaded as they ought to have done. The plea, therefore, must be taken to allege that the testator paid the money on the day mentioned in the condition; and then it comes within the rule laid down in *Bush* v. *Leake* (*a*), *Darbishire* v. *Butler* (*b*), and *Smith* v. *Bond* (*c*). This is a money bond, at least a money bond as to part of it, and in an action upon such a bond, there is no necessity for the plaintiff to assign a fresh breach in his replication, but he is at liberty to join issue on the payment of the money. I cannot see how the present case differs from those in which there is an affirmation of payment on the one side, and a negation on the other, which was the very ground upon which the Court based their decision in *Bush* v. *Leake*. It seems to me, therefore, that our judgment must be for the plaintiff.

COLTMAN, J.—The plea would be defective, I think, even on general demurrer; but if it is to be considered as a good plea, it must be taken to aver that which is material to the defence, namely, that the money was paid on the

(*a*) 3 Doug. 255.
(*b*) 5 Moore, 198.
(*c*) 10 Bing. 125.

day mentioned. If that be so, then the plaintiff was at liberty to traverse the payment.

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CRESSWELL, J.—I am of the same opinion. The observations made by the Lord Chief Justice have exhausted the subject.

ERLE, J., concurred.

Judgment for the plaintiff.

BENTLEY *v.* FLEMING.

SC. 1. C 73. 479.

THIS was an action for the infringement of a patent granted for an improvement upon Dyer's patent for introducing metal teeth into the backs of cards used for the purpose of combing wool. The defendant pleaded, inter alia, not guilty; that the patentee was not the first inventor; and that the invention was not new. The trial took place before *Cresswell*, J. at the last Summer Assizes for Liverpool, and in summing up the learned Judge left three questions to the jury, which he wrote down on a slip of paper, and handed to the foreman when the jury were about to retire. These questions were—whether there had been an infringement of the patent? whether the original patentee was the first and true inventor? and whether the invention was in public use before the patent was granted? It was agreed by the counsel on both sides that the associate should take the verdict, and the learned Judge left the Court, having previously handed to the associate his abstract of the pleadings, and directed him to take the verdict upon each of

Upon the trial of a cause, in which three issues were raised, each going to the whole cause of action, it was agreed on both sides that the verdict should be taken by the associate in the absence of the Judge, who, before he retired from the Court, directed the associate to take the verdict upon each of the issues separately. Upon the return of the jury, the associate asked them whether they found for the plaintiff or the defendant; and the foreman answered "for the plaintiff." The defendant's counsel requested the associate to put the questions left to the jury by the Judge, to which the plaintiff's counsel objected; whereupon the associate refused to put the questions, and ultimately a general verdict was entered for the plaintiff: *Held*, that the neglect to take the verdict upon each of the issues, was a miscarriage on the part of the officer of the Court in taking the verdict; and the Court, therefore, made a rule absolute for a new trial, without costs on either side.

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these three issues. The jury then retired, and upon their return into Court, the associate put the usual question, whether they were agreed upon their verdict. The foreman answered, "Yes." The associate then said, "Do you find for the plaintiff or the defendant?" and the foreman replied, "We find for the plaintiff." The counsel for the defendant thereupon requested the associate to put to the jury the questions left to them by the learned Judge; but the counsel for the plaintiff objected to any further questions being put to the jury. The defendant's counsel persisting in requiring the associate to put at least one of the questions, which he refused to do, one of the jury observed, "We find unconditionally for the plaintiff;" and another juryman remarked, "I think there were three questions left for our consideration by the Judge." Upon which the associate remarked, "Gentlemen, you had better not." Ultimately a verdict was entered generally for the plaintiff, with forty shillings damages.

Sir *T. Wilde*, Serjt., having (in Michaelmas Term) obtained a rule nisi for a new trial, upon affidavits disclosing these facts.

Channell and *Byles*, Serjts., (with whom was *T. Webster*,) now showed cause. They contended that the verdict of the jury was properly entered; as it was quite clear that they were fully aware of the bearing of the questions left to their consideration by the learned Judge. The jury must have known, after the explanation of the issues given in the summing up, that each of the pleas in question went to the whole cause of action, and therefore they would have found a general verdict for the defendant, in answer to the question of the associate, if they had been prepared to find for the defendant upon any one of the three distinct issues.

Sir *T. Wilde*, Serjt., (*Cowling* and *J. Addison* were with him,) was not called upon by the Court.

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TINDAL, C. J.—It seems to me that there has been a miscarriage in the delivery of the verdict by the jury to the officer of the Court. If the associate had followed the directions which he received from the Judge, there would have been such a finding as to shut out all doubt upon the matter; but, as the case now stands, it is clear that a doubt was expressed by the defendant's counsel, and by one of the jurors, which ought to have been cleared up at the time. It is one thing to ask the jury whether they find for the plaintiff or the defendant, and another to ask them in whose favour they find upon each of the specific issues in the cause. It is quite enough for us to say that, from what appears to have taken place, there may have been a difference of opinion among the jury. It is possible that if their attention had been directed to the third issue, some of the jurors would have dissented from the verdict given by the foreman, for it appears that one of the jurymen observed, "I think there were three questions left for our consideration by the Judge." The associate ought not to have paid any attention to the interposition of counsel, but he should have put the questions seriatim, as directed. As he did not do so, we must look at the result as a miscarriage of the verdict occasioned by the officer of the Court, which is the same as a miscarriage by the Court itself. The cause, therefore, must go down again for another trial, no costs being paid on either side.

PER CURIAM.

Rule absolute accordingly.

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In re the Wife of George ATHERTON.

It is no objection to the issuing of a commission to take the acknowledgment of a feme covert resident beyond seas, under stat. 3 & 4 Wm. 4, c. 74, s. 83, that her Christian name is unknown; but when the commission is returned, the Court will require strict proof of her identity.

TALFOURD, Serjt., moved for a commission to take the acknowledgment of a married woman under stat. 3 & 4 Wm. 4, c. 74, s. 83. The lady was resident with her husband at Sydney, in New South Wales, and the difficulty in the case was, that her Christian name was unknown in this country. The 83rd section of the statute required that the name of the married woman whose acknowledgment was to be taken, should appear in the commission, but he submitted that the object of the statute would be satisfied if she could be described by other means.

PER CURIAM.—The commission may issue, but more than ordinary care must be taken to identify the lady by the affidavits when the commission is returned.

Fiat.

MURRAY *v.* SILVER.

2 Q. 1 C.B. 638.

Where a rule nisi had been obtained for judgment as in case of a nonsuit, with a stay of proceedings, the Court set aside a rule to discontinue subsequently obtained.

THE defendant in this case had obtained a rule nisi for judgment as in case of a nonsuit, and the rule was drawn up, with a stay of proceedings until cause should be shewn. Before the rule came on for argument, a rule to discontinue upon payment of costs, was taken out by the plaintiff, and the defendant thereupon moved for and obtained a rule nisi to set aside the rule to discontinue, with costs, upon the ground that it was a proceeding in the cause.

Channell, Serjt., now shewed cause against the defendant's last rule, contending that a rule to discontinue was not a step in the cause, within the meaning of the rule for staying proceedings.

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Dowling, Serjt., contrà, referred to *Lowe* v. *Peacock* (*a*), where the Court held that an application for leave to discontinue, after a rule nisi had been obtained for judgment as in case of a nonsuit, was wrong.

TINDAL, C. J.—One can hardly say that a discontinuance is not a step in the cause, when the plaintiff is obliged to tax and pay the defendant's costs, before any effect can be given to the rule to discontinue. *Lowe* v. *Peacock*, seems to be in point, and I see no reason to question the authority of that case. The rule will, therefore, be absolute, to set aside the rule to discontinue.

Rule absolute.

(*a*) Barnes, 316.

WADE *v.* SIMEON.

SC. 1. CB - 610

The plaintiff agreed with the defendant to withdraw the record in an action on two cheques which stood ready for trial in the Exchequer, upon the terms that the defendant should pay the debt, interest, and costs, on or before a certain day, or in default of payment, that the plaintiff should be at liberty to sign judgment, and that a Judge's order should be given to secure payment. The Court of Exchequer having afterwards set aside the Judge's order, which had been made in pursuance of the above agreement, the plaintiff brought an action on the agreement in this Court: *Held*, that these facts formed no ground for staying the proceedings in the action in this Court.

AN action had been brought by the plaintiff against the defendant in the Court of Exchequer, to recover the amount of two cheques, one for 1300*l.*, and the other for 700*l.* The defendant had pleaded, inter alia, that the cheques had been given for money won by gaming. Notice of trial had been given for the sittings at Westminster after last Michaelmas Term, and the cause was set down for trial on the 7th of December. The defendant was unable, up to the 6th of December, to procure sufficient evidence to make out the defence that the cheques were given for money lost at play, and accordingly upon that day, an arrangement was made that upon payment by the defendant of 2000*l.*, and interest on the cheques, with costs, on or before the 14th of December instant, the record should be

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withdrawn, and all further proceedings in the cause should be stayed; and that in default of payment, the plaintiff should be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid at the time of such default, and that a Judge's order should be obtained to secure the payment. A Judge's order was accordingly drawn up, by consent, to secure the payment upon the terms above mentioned, and the record was withdrawn by the plaintiff. On the 14th of December, the defendant, who had in the meantime collected evidence sufficient to substantiate his plea of gaming, obtained a Judge's order to stay all proceedings, upon his bringing the money into Court, until the fifth day of Hilary Term. Within the first four days of the Term, the Court of Exchequer was moved on his behalf for a rule nisi to set aside the Judge's order of the 6th of December, and the rule having been granted, was made absolute on the 27th of January, upon the terms that the amount of the debt and costs should remain in Court, and that the action should be speedily tried. Upon the same day, the plaintiff commenced the present action in this Court for a breach of the agreement made between the parties on the 6th of December. The defendant then moved this Court for a rule nisi to stay all proceedings, or for a month's time to plead.

Channell and *Byles*, Serjts., shewed cause against the rule. The Court will not interfere in a summary manner in a case like the present. The plaintiff does not sue in breach of good faith, as was done in *Moscati* v. *Lawson* (*a*), and *Cocker* v. *Tempest* (*b*); but, on the contrary, having carried out his part of the arrangement by withdrawing the record in the action in the Exchequer, he seeks to compel the defendant to perform his share of it. It will no doubt be contended, on the other side, that the cause of action in both Courts is substantially the same, but it is submitted

(*a*) 4 A. & E. 331. (*b*) 7 M. & W. 502; See S. C. 9 Dowl. 306.

that the agreement declared upon in the present case presents a very different question for trial from that which would have been laid before a jury assembled in the Court of Exchequer, if the action upon the cheques had been tried on the 7th of December. The plaintiff is entitled to the judgment of the Court, in the due course of law, as to the validity and effect of the agreement of the 6th of December. No ground can be made out for the summary interposition of the Court in the manner which has been prayed, without shewing that the two actions are brought for precisely the same thing; *Dicas* v. *Jay* (*a*).

Kinglake, Serjt., (*Barstow* with him) in support of the rule. The arguments urged on the behalf of the plaintiff have already been pressed unsuccessfully on the Court of Exchequer. It was contended before that Court, that the agreement of the 6th of December was a distinct agreement between the parties, of the benefit of which the plaintiff ought not to be deprived; yet the Court set aside the Judge's order founded upon that agreement, upon the ground that the question upon which the parties were really at issue, the validity of the cheques, ought to be determined by a jury. The plaintiff seeks to evade the trial of that question by bringing the present action. It is clear upon the authorities, that a party cannot avoid the effect of an order made by one Court, by bringing an action in another; *Doe d. Carthew* v. *Brenton* (*b*); *Parkin* v. *Scott* (*c*).

TINDAL, C. J.—The plaintiff has a primâ facie cause of action upon the agreement set out in the declaration, and he has a right by the law of the land to the judgment of the Court in the usual way, either upon demurrer, or by the verdict of a jury, or in such other manner as the

(*a*) 6 Bing. 519; See S. C. 4 M. & P. 285.
(*b*) 6 Bing. 469; See S. C. 4 M. & P. 186.
(*c*) 1 Taunt. 565

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course of the proceedings may render necessary. We ought, therefore, to see if this right has been taken away from him by what has occurred in the Court of Exchequer. Now, upon looking into the proceedings which took place in that Court, it seems to me that the Court of Exchequer did not mean to go farther than to refuse summarily to give effect to the agreement of the 6th of December by the aid of a Judge's order. They set aside the order, which is said to have been founded upon the agreement; but that seems to me to leave the agreement as it stood before. If, therefore, this action should be tried, the defendant can, by a plea of non-assumpsit, put the plaintiff to prove the agreement, and if he cannot prove it, he must be defeated in the action. If, however, he should produce evidence to shew an agreement between himself and the defendant, he ought to recover, and therefore I do not think that we should be justified in saying, upon an application like the present, that the plaintiff is debarred from taking that course by what has occurred in the Court of Exchequer. The present does not resemble any of that class of cases in which the Courts have stayed proceedings in a summary manner, upon the ground that a breach of good faith has been committed, and, therefore, I think the rule should be discharged, with liberty to the defendant to plead within a reasonable time.

COLTMAN, J.—The cases of *Doe d. Carthew* v. *Brenton* (*a*), and *Parkin* v. *Scott* (*b*), on which my Brother *Kinglake* relies, do not appear to me to afford much assistance to his argument. In both cases, the party who brought his action in this Court was seeking to escape from the effect of an agreement to which he had consented, but here the plaintiff endeavours to enforce an agreement, of which he complains he has not had the benefit.

(*a*) 6 Bing. 469. (*b*) 1 Taunt. 565.

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CRESSWELL, J.—The plaintiff has declared upon an agreement by the defendant to pay him a sum of money for a certain consideration, and also to give him a Judge's order in order to secure the payment of the money so agreed to be paid. The Court of Exchequer have set the order aside, but in doing so they did not decide that there was no such agreement. Whether there were such an agreement or not is a question that remains to be tried. The case of *Doe d. Carthew* v. *Brenton* (*a*), does not at all apply. There is no attempt here to defeat an arrangement to which the plaintiff has assented in another Court.

ERLE, J., concurred.

Rule discharged; the defendant to have fourteen days' time to plead.

(*a*) 6 Bing. 469.

DOE dem. WYATT *v.* BYRON.

3 C. 1 C. P. 623.

A sub-lessee is a tenant of premises within the meaning of the stat. 4 Geo. 2, c. 28, s. 4, and is therefore entitled to a stay of proceedings upon payment into Court of the rent in arrear and costs.

THIS was an ejectment for premises at Paddington, which had been demised by Wyatt to one Steel, who afterwards being in difficulties, sub-let the property to the defendant and other persons, as trustees for his creditors, for the whole of the original term, except the last two days. The lease to Steel contained various covenants on his part to build, repair, pay rent, &c., but a power of re-entry was reserved to Wyatt only in case of the non-payment of rent. The covenants were not kept, and the rent being in arrear, this action was commenced, upon which the defendant, before trial, took out a summons before *Maule*, J., at Chambers, to stay all proceedings, upon payment of the rent and costs, pursuant to stat. 4 Geo. 2, c. 28, s. 4. It was objected that a sub-lessee did not come within the provision of that

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Doe dem. WYATT v. BYRON.

section of the act, but the learned Judge made the order for a stay of proceedings upon the terms above stated. A rule nisi was subsequently obtained to rescind this order.

Talfourd, Serjt., (with whom was J. *Addison*), shewed cause. In the first place, the Court has power, at common law, to give relief to the tenant in possession, by staying proceedings for a forfeiture upon payment of the rent due and costs. The Courts exercised a discretion in such cases before the stat. 4 Geo. 2, c. 28, was passed, and the statute does not interfere with that discretion. In *Doones* v. *Turner* (*a*), the Court stayed all proceedings upon the tenant's bringing all the rent into Court, and accepting a new lease. *Smith* v. *Parks* (*b*) was decided upon the same principle. The existence of such a practice before the statute is also recognised by Lord *Ellenborough*, C. J., in *Roe d. West* v. *Davis* (*c*), where he observes, that the statute only meant to legalise the practice to a certain extent, viz., upon the application of the tenant before trial, as in the present instance. In that case, therefore, the Court refused to interfere when the application was made after a trial had taken place, and the authority of this decision was acknowledged in the subsequent case of *Doe d. Harris* v. *Masters* (*d*). It is submitted, however, secondly, that the defendant clearly comes within the scope of the fourth section of the statute (*e*). There is no reason why the

(*a*) 2 Salk. 597.

(*b*) 10 Mod. 383.

(*c*) 7 East, 366.

(*d*) 2 B. & C. 490.

(*e*) Section 4. "That if the tenant or tenants, his, her, or their assignee or assignees, do or shall at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case, all further proceedings on the said ejectment shall cease and be discontinued: and if such lessee or lessees, his, her, or their executors, administrators or assigns, shall upon such bill filed as aforesaid," (referring to the preceding section) "be relieved

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relief should not be co-extensive with the penalty imposed, and the parties who will really suffer by the forfeiture of the lease are those whom the defendant represents. The second section of the act confers upon the landlord the power of re-entry without making any formal demand, and the fourth section bestows a corresponding boon upon the tenant or his assignee. The question then really comes to this, is the defendant an assignee of the term within the meaning of the latter clause? It is submitted that he does come within the equity of the statute. In *Doe dem. Whitfield* v. *Roe* (*a*), it was held that the mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, as the lessee. Here the defendant has the whole interest in the Term, except two days.

Byles, Serjt., in support of the rule. The order of the learned Judge ought to be set aside. There is no doubt that the defendant might formerly have obtained relief in equity, but the effect of the stat. 4 Geo. 2, c. 28, is to restrain relief. Very great injustice would be done if the language of the fourth section were not to receive a construction strictly in accordance with the words of it. The defendant, being only a sub-lessee, is not liable to the covenants of the lease, and the lessor of the plaintiff is, therefore, without any remedy against him. The defendant, however, claims to be relieved from the forfeiture incurred by the lessee's breach of covenant. There is no precedent for such an application, except on the part of the person who is bound by the covenants in the lease. The third section recognises a right to equitable relief not only in the lessee or assignee, but also in the sub-lessee, because it speaks of "persons claiming any right, title, or interest, in law or equity, of, in, or to the said lease." That clause, and the second, were

in equity, he, she, and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease to be thereof made to him, her, or them."

(*a*) 3 Taunt. 402.

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intended for the protection of the landlord, but then comes the fourth section, and introduces new provisions, not in favour of the landlord, but of the tenant. Nothing, however, is said in this clause of "other persons" claiming any interest in the lease; the words are simply "tenant" and "assignee." The word "tenant" is not used in the section to signify per se "the tenant in possession," because the tenant in possession may be a tenant at sufferance, or a trespasser. It is submitted that the word "tenant" means "lessee," and the words "such lessee or lessees," which occur in a subsequent part of the clause, materially strengthen that view of the case. The authorities cited on the other side do not support the position for which the defendant contends, and the more ancient of them shew that the Court would only interpose upon the terms that the party applying for a stay of proceedings should accept a new lease, and thus be bound by the covenants contained in it, to which a sub-lessee would not be liable.

TINDAL, C. J.—We do not mean to decide this case on the particular circumstances of difficulty in which the landlord is placed by the peculiar construction of the lease; because we should arrive at the same determination if the original lease had contained a condition for re-entry in the event of non-performance of any one of the covenants. The particular circumstance of difficulty imported into this case is, the neglect of the landlord to insert in the lease a provision against sub-letting, without his consent. The question between the parties arises upon the construction of this act of Parliament, and turns chiefly on the words "tenant or tenants, his, her, or their assignee or assignees," contained in the fourth section. I think, however, that we ought not merely to look at the fourth section, but to the other clauses of the act, and see whether any consistent meaning can be given to these words. The word "tenant" is clearly large enough in itself to comprehend not only the original lessee or assignee of a lease, but also the

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person coming in under the lessee. The word "assignee" will have its full force if you give to the word "tenant" the meaning of "lessee." Now, the second section of the statute contains a provision in favour of landlords, the words of which are these: "in case the lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming or deriving under the said leases, shall permit and suffer judgment to be had and recovered" in ejectment, &c., they shall be barred from relief at law or in equity. Clearly, therefore, the persons in the contemplation of the Legislature who are thus debarred from any remedy are persons who are in possession of the land either as lessees or assignees, or such as claim under them. Upon looking at the fourth section, we find a benefit conferred upon the tenant, and when that section refers to the terms upon which proceedings may be stayed, we should expect to find that the words used in that section were coextensive with those employed in the former clause. The fourth section says, "that if the tenant or tenants, his, her, or their assignee or assignees, do or shall at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs; then and in such case, all further proceedings on the said ejectment shall cease and be discontinued." It seems to me that it would be a singular thing to give a stricter and closer meaning to these words, when a remedy is pointed out by requiring the payment of the money into Court, than is attached to them in the second section of the act, which confers and limits the rights of the parties. It is to be observed, too, that the fourth section provides that the proceedings shall be stayed upon payment of rent and all arrears of rent, without reference to the party from whom the rent may be due. I think, therefore, that the meaning of this section, which is of a remedial character, is not necessarily narrowed within the limits contended for,

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and that the words embrace the present defendant. The rule must be discharged.

COLTMAN, J.—I think that the argument used by my Brother *Byles* proceeds on a too strict and critical construction of the words of the act of Parliament. We must look to the object of the act, and the main object appears to be the more easy recovery of rents, and renewal of leases; the principal object being to afford facilities for the recovery of rent. The proper mode of construing the statute, therefore, would be to put such an interpretation upon its provisions as should advance that object. My Brother *Byles* relies on the omission in the fourth section of the words "other persons claiming under them," which are found in the third; and he argues, that if any benefit had been intended to be conferred on sub-lessees, those words would have been inserted. That argument would, I think, have had more weight, if the expression in the fourth section had been "lessees," as in the second and third sections; but when we come to the fourth section, the phraseology is changed, and the word "tenant" is used, which leaves room for a far more extended construction. In the second section, also, the word "tenant" is used in a larger and more comprehensive sense than "lessee," since it enacts that the declaration in ejectment may be affixed to the door of the messuage, if there be "no tenant in actual possession of the premises." The term "tenant," therefore, is clearly used in that section in a more extended sense than that for which the plaintiff's lessor contends. It appears to me that the act was meant to assist the landlord as much as possible in getting his rent, and we certainly shall promote that object by holding that a sub-lessee may pay the rent as well as the lessee, or the assignee of the term.

CRESSWELL, J.—It appears to me that the order of the Judge was made in very guarded terms, so as to relieve

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the defendant from forfeiture only so far as that had been incurred by the non-payment of rent. My Brother *Byles* pointed out what he contended was a great hardship in the case, as an argument that we ought not to extend the statute beyond its terms. He said, that if the proceedings were stayed, the lessor would lose the benefit of the covenants contained in the lease, because the sub-lessee was not bound by them. But whatever loss or detriment the landlord may have suffered, it is his own fault in neglecting to insert stipulations for re-entry in the event of such covenants not being performed. The statute seems to me to contemplate two things. The second section gives certain remedies to the landlord, and provides, that if the proceedings are allowed to go on, and the parties, against whom execution is obtained, do not file a bill within six months afterwards, they are to be for ever barred. The third section then decrees, that if they do file a bill in equity within that period, still such proceedings shall not be stayed; but that the landlord may go on, unless the tenant pay into Court enough to cover the arrears of rent, and all costs and expenses. Then comes the fourth section, which applies to cases where the party proceeded against comes to pay the money into Court before trial, and here the phrase, which was "lessees" before, is changed, and the larger word "tenant" is used. I think, therefore, that we shall put a consistent construction upon the act, if we hold that the same classes of persons may pay money into Court both before and after trial. The order of the Judge must therefore stand, and the rule must be discharged.

ERLE, J., concurred.

Rule discharged.

COURT OF EXCHEQUER.

Trinity Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

HARMER *v.* JOHNSON.

Se. 14 M & W. 336

(*Before Parke*, B., *sitting alone.*)

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More than a year having elapsed after judgment entered up on a warrant of attorney, the defendant agreed to waive the necessity of a scire facias: *Held*, that such agreement was no part of the defeasance or condition, and did not render the warrant of attorney void as against the defendant's assignees, for want of inrolment under the 3 Geo. 4, c. 39.

Writs in the new form do not require to be connected by continuances as writs under the old forms. On final process, one writ may issue in continuation of another at any time; but on mesne process, the writ in continuation must issue within twelve months after the issuing of the prior writ.

THIS was an application by the assignees of a bankrupt to set aside an execution issued on a judgment entered up on a warrant of attorney given by the bankrupt. The judgment was signed on the 3rd of September, 1841, and more than a year afterwards, a Judge's order was obtained by consent, to issue execution without a scire facias. Accordingly, on the 14th of September, 1842, a fieri facias issued in the new form, returnable on execution, which writ, on the 29th of December, 1842, was returned nulla bona. On the 23rd of April, 1845, an alias fieri facias issued, under which a levy took place. The defendant afterwards became bankrupt. It was objected, first, that the execution issued without a scire facias to revive the judgment. Secondly, that the alias writ of fieri facias was irregular, because it was not properly connected with the first fieri facias.

Martin shewed cause. There is no irregularity in the writ. *Simpson* v. *Heath* (*a*) shews that there is a material

(*a*) 7 Dowl. 832; S. C. 5 M. & W. 631.

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difference between the new process and the old. In that case it was held that a defendant might be taken in execution after the expiration of a year from the judgment upon a ca. sa. sued out within the year, although not returned and filed within the year; and that no scire facias was necessary. But, even supposing that in this case a scire facias ought to have issued, there has been an express consent to waive it by the bankrupt at the time when such consent was binding on him. The suing out execution, without reviving the judgment when necessary, is only ground of error, and that has been waived by the consent; 2 *Wms. Saund.* 72 *e, n.* (*x*). Secondly. Under the new form of writs there is no necessity for entering continuances, because the writs are not returnable until execution. The Court called on

J. Henderson, to support the rule. Both writs are void. The first writ issued more than a year after the judgment, without a scire facias to revive it; and though the consent to the Judge's order might be binding on the bankrupt, it is a nullity as against the assignees, for its effect is to import a new stipulation into the warrant of attorney. The 3 Geo. 4, c. 39, s. 1, enacts, that "every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in his Majesty's Court of King's Bench at Westminster, or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other Court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the docquets and judgments in the said Court of King's Bench." And the second section of that statute enacts, that "if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of

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bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid, within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney, within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized, under and by virtue of such judgment and execution." Under that statute it is evident, that if the parties introduced into the defeasance other terms than those written upon the warrant of attorney, and filed with it, the instrument would be void. Here there is an important term introduced by the subsequent agreement of the parties. At all events, the second writ is void, for the consent could only apply to the particular execution for which it was given, namely, the first writ which was returned in 1842. *Simpson* v. *Heath* (*a*) only decided that a writ of execution issued within the year, need not be returned within the year. That case is explained by *Parke*, B., in *Greenshields* v. *Harris* (*b*), who says, "a writ of ca. sa., unlike those writs, the duration of which is limited by the Legislature, runs until it is executed; and it is a mistake to suppose, that if it be not executed within twelve months, the law makes any presumption in favour of the defendant." It is conceded, that where a writ of error has been brought and discontinued, execution may issue without a scire facias, though the year be expired before error brought; *Bellasis* v. *Hanford* (*c*). But in this

(*a*) 7 Dowl. 832; S. C. 5 M. & W. 631.

(*b*) 9 M. & W. 774; S. C. 2 Dowl. 272, N. S.

(*c*) Cro. Jac. 364.

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case twelve months had elapsed since the last recorded step. Suppose the judgment had been revived by scire facias in 1842, it would have been necessary to have a new scire facias to support the writ issued in 1845. [*Parke*, B.—When the Legislature altered the form of returning writs, it never considered how they were to be continued; and thus has arisen the difficulty.] No continuances can be entered, for the second writ is an alias, and not a pluries. There must still be some connecting link between the writs, and, if that cannot be done under the new process, the old must be resorted to. [*Parke*, B.—How would you enter continuances? You cannot have a pluries until the alias is returned?] A second scire facias should have issued.

Cur. adv. vult.

PARKE, B.—In this case, which was argued before me, Mr. *Henderson* obtained a rule to set aside an execution on a judgment on a warrant of attorney, with a defeasance. [His Lordship then stated the facts.] The principal ground on which the application was originally made was, that the first execution issued without a scire facias to revive the judgment; but that objection appearing to have been removed by the Judge's order, by consent, Mr. *Henderson* relied upon two others. The first was, that the Judge's order by consent, though valid between the parties, was void as against the assignees, as being against the policy of the law, 3 Geo. 4, c. 39, which makes warrants of attorney void against assignees unless registered; and expressly enacts, that such warrants of attorney upon which the defeasance or condition has not been written, shall be void to all intents and purposes. This proviso the Court of Queen's Bench, in *Bennett* v. *Daniel* (*a*) held, had the effect of avoiding such warrants of attorney as to assignees only; and Mr. *Henderson* argued, that the stipulations that

(*a*) 10 B. & C. 500; See S. C. 5 M. & R. 444.

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no scire facias should be necessary, not being part of the defeasance indorsed on the warrant of attorney, was altogether void as against his clients. This objection, I am of opinion, ought not to prevail; because the agreement to waive the necessity of the scire facias was in fact no part of the defeasance or condition, even supposing that term to embrace all the contemporaneous stipulations; for it was made at a subsequent time, and indeed was nothing more than a waiver of the suing out a scire facias (which the plaintiff was about to do in order to warrant an execution on his judgment) and was consented to for the purpose of saving expense. The next objection was, that the alias fieri facias was irregular, because it was not properly connected with the first fieri facias, nor could any continuances be entered on the roll to cure that defect; because, if continuances were entered, it would be necessary to amend the alias, by converting it into a pluries; and such an amendment, though it would be allowed as against the original defendant, could not be permitted as against his assignees. This objection is founded on the supposition that process in the new form must be continued in a similar manner to that in the old form. It seems to me that this is unnecessary. In the old form, each subsequent writ of mesne process was tested on the return day, or the quarto die post, when the proceedings were by original, and, in case of final process on the return day of the preceding writ. The writ might be sued out tested of a prior date, and there never was any difficulty in connecting one writ with another by an entry of "vicecomes non misit breve" on the return day of the prior writ. But in the new process the writs must be tested or bear date on the days they are sued out, (2 Wm. 4, c. 39, s. 12); and writs of capias ad respondendum are returnable on execution, but have a return day contingently at the end of four months; those of capias ad satisfaciendum have no fixed return day; they are returnable on execution, and, if not executed, are not properly returnable at all; the Judge's order, in case of

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writs of execution, being rather a mode of obliging the sheriff to notify to the Court what has been done under the writ, than creating a new return day for the writ instead of the former one, expressed in the body of the writ itself; *Kemp* v. *Hyslop* (*a*). The old mode of continuing by entering on the record a fictitious writ, with a teste of the return day of the former writ, cannot now be adopted with respect to this description of writ, for there is no such return day; and, if a Judge's order had the effect of making a return day for the writ, or if the writ, when returned in obedience to it, would be spent and determined, (as I have no doubt it would), so that a new writ might issue founded on the return, I do not think the Court would sanction the entry on the record of a fictitious Judge's order to return a writ in order to make proper continuances; and, if one writ was actually returned by virtue of a Judge's order, another new writ, which must be tested on the very day it issues, could not be a proper writ in continuation, unless it actually issued on the very day of the former return, a course so inconvenient, that it could very rarely be adopted, and, practically, there would be no available mode of continuing such a writ on the old principle, which, though a fiction, made the record consistent, and excluded any presumption of satisfaction of the debt arising from intermediate delay. What then is to be done where a writ of execution is issued within the year after the judgment, or its revival, and the plaintiff wishes to avoid the necessity of a scire facias? Must the plaintiff issue process in the old form, with fixed return days, which he has the option of doing (for the statute of 3 & 4 Wm. 4, c. 67, is not obligatory) or may he adopt the new form without any continuances? If the Legislature did not intend that the process in the new form should be connected together in any way, then it would follow, that if the plaintiff meant to avoid the necessity of a scire facias,

(*a*) 1 M. & W. 58; See S. C. 4 Dowl. 687.

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he must adopt the old form of process, and the old form of continuances; or, if the Legislature intended that the new process should be connected by issuing the one writ on the precise day that the other was returned, that course must be adopted. It is highly probable that all the consequences of the changes introduced by the statutes 2 Wm. 4, c. 39, and 3 & 4 Wm. 4, c. 67, were not foreseen; but I think that the Legislature must be taken to have intended that process in the new form should be connected, and that the only mark of connexion should be the description of one writ being an alias or a pluries writ. Now, with respect to mesne process, it is clear that the intention of the Legislature was, that the writs should be connected; for it is expressly provided by the 2 Wm. 4, c. 39, s. 10, that every writ of summons and capias may be continued by an alias and pluries. It is unnecessary that one writ of mesne process, in continuation of another, should be issued on the very return day of the former writ; for where the operation of any Statute of Limitations is to be defeated (when the object is not to favour the connexion of one writ with another) it may be sued out within one month. It would seem that the writs might be sued out at a greater interval in ordinary cases, and it has been so held with respect to a capias ad respondendum, even where it was issued beyond the period of four months; *Nicholson* v. *Leman* (*a*): nor need the first writ be returned; *Gregory* v. *Des Anges* (*b*). What then is to be the interval during which a writ may be issued in continuation of another on mesne process? There appears to be none but the limitation of twelve months, after which the cause is out of Court. As the subsequent statute for the amendment of the former (3 & 4 Wm. 4, c. 67), enables a plaintiff to sue out writs of execution in the new forms, I think it must be intended that such writs should have similar properties with writs of mesne process, and, consequently, that suc-

(*a*) 2 Cr. & M. 469; See S. C. 2 Dowl. 296.

(*b*) 3 Bing. N. C. 85; See S. C. 3 Scott, 534; 5 Dowl. 193.

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ceeding writs need not be tested on the day of the return of the preceding writ, nor within any particular time afterwards, for the limitation of twelve months does not apply after judgment. Nor will any practical inconvenience to the defendant follow, for a writ of execution may now be sued out with a long interval between the teste and return, the rule as to process being returnable in the following Term not being applicable to final process; nor if the writ be continued on the record, does the defendant derive any real advantage. If the amount of the judgment has really been paid before the alias or pluries writ has issued, the defendant would be relieved on motion on auditâ querelâ. For these reasons I think the execution regular, and that this rule must therefore be discharged, but then it ought to be without costs.

Rule discharged.

HODGSON *v.* CHETWYND.

On plea of nul tiel record, it is no objection that the award of the venire and the distringas are cancelled by lines being drawn across them.

DOWDESWELL moved, upon plea of nul tiel record, for judgment on production of the record.

The record was produced and certified by the Master to be correct.

Flood objected that the plaintiff was not entitled to judgment, as it appeared that the award of the venire and the distringas had been cancelled by lines drawn across them.

PARKE, B.—That is of no importance. The Master certifies that the record is in other respects correct, and if there is any error in the judgment, the defendant must resort to his writ of error.

PER CURIAM.

Rule absolute.

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sc. 14 M&W. 465.

BAKER *v.* WALKER.

To assumpsit by payee against maker of a promissory note, the defendant pleaded that the note was given for a judgment debt, and that there never was any other consideration.

Replication de injuriâ. On demurrer to the replication: *Held*, that both plea and replication were bad.

DEBT by payee against maker of a promissory note, for 26*l.* 5*s.*, payable three months after date.

Plea: that the note was made and delivered to the plaintiff for and on account of a certain judgment debt of 20*l.* 15*s.* 6*d.* recovered by the plaintiff against the defendant, and that except as aforesaid, there never was any consideration or value for the making or delivery of the said note to the plaintiff.

Replication, de injuriâ.

Special demurrer, assigning for causes that the general form of replication is bad, inasmuch as the plea involved matter of record which was not triable by the country. Joinder.

The plaintiff's point for argument was, that the plea was bad, as it shewed on the face of it a good and sufficient consideration for making the promissory note.

H. Hill, in support of the demurrer. The replication is clearly bad, as it attempts to put in issue matter of record. [*Parke*, B.—There is no question about the replication, but is the plea good?] The plea shews that the note was given without consideration. It is not alleged that the note was payable to order, and, upon general demurrer, it must be taken not to have been so; consequently it would not operate as a suspension of the debt, but is only a promise to pay at a future period that which the defendant was then liable to pay. Such a promise could not affect the plaintiff's right to proceed upon the judgment; *Davis* v. *Gyde* (*a*). A promise by a defendant to pay a judgment debt in consideration that the defendant would stay execution thereon, will not support an action of assumpsit; *Anonymous* (*b*). He also cited *Poplewell* v. *Wilson* (*c*).

(*a*) 2 A. & E. 623; See S. C. 4 N. & M. 462.

(*b*) Cowp. 128.

(*c*) 1 Stra. 264.

Hance, contrà, was not called upon.

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PARKE, B.—I am of opinion that the plea is bad; for there was a debt in existence on account of which the note was made, and that is a sufficient consideration. In *Poplewell* v. *Wilson* it was held, that a note given for the debt of a third party was good, and that doctrine has been acted upon in many subsequent cases. The *Anonymous case* cited from *Cooper* is distinguishable, for that was the case of a naked promise, without any security. But a note is something more than a mere promise, and though not a specialty, it is at all events a security. When a judgment creditor takes from his debtor a bill or note, every one would infer an agreement to suspend his remedy on the judgment until the bill became due. It is evident, therefore, that there is a consideration that distinguishes this case from *Serle* v. *Waterworth* (*a*). The plea is therefore bad, and the plaintiff is entitled to our judgment.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the Plaintiff.

(*a*) 4 M. & W. 9; See S. C. 6 Dowl. 684.

SMITH *v.* GOFF.

(*Before Parke*, B., *sitting alone.*) *SC - 14 JurW. 264.*

A RULE nisi had been obtained for setting aside the award made in this case, on the ground that the evidence of the witnesses had not been taken on oath. The cause was referred by a Judge's order, containing the usual clause

The usual clause in an order of reference that the arbitrator "shall be at liberty (if he shall think fit) to examine the parties and their respective witnesses on oath," does not render it imperative on the arbitrator to examine the witnesses on oath.

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that the arbitrators or umpire "shall be at liberty (if they shall think fit) to examine the parties and their respective witnesses on oath." The affidavits in support of the application stated, that the defendant, in the course of the reference, required the arbitrators to take the examination of the witnesses on oath, but that they refused to do so.

Hance shewed cause. Under this order of reference the arbitrators are at liberty to take the examination of the witnesses on oath or not, as they may think proper. There is no rule of law which renders it incumbent on arbitrators to take the evidence on oath. Indeed, previously to the statute 3 & 4 Wm. 4, c. 42, s. 41, an arbitrator had no power whatever to administer an oath, and that statute only empowers and requires him to do so, when it is by the order of reference or submission to arbitration expressly ordered or agreed that the witnesses shall be examined on oath. In the present order of reference, the words "shall be at liberty, &c.," cannot be deemed to apply to the examination of the parties to the suit only, but according to the true grammatical construction override the whole sentence, and apply equally to the witnesses as to the parties.

Petersdorff, in support of the rule. It has generally been understood, that under an order of reference like the present, an arbitrator was bound to examine the witnesses on oath, if required to do so by either party. In the present case, an express request to that effect having been made, the arbitrators were not justified in proceeding to examine the witnesses otherwise than on oath. The order of reference may perhaps in terms appear to give the arbitrator an option; but its real meaning is, that so far as the witnesses are concerned, it should be obligatory on the arbitrators to take the examination on oath.

PARKE, B.—No. The order of reference clearly leaves it in the option of the arbitrators, and although one side

required the witnesses to be sworn, yet the other did not. I am, therefore, of opinion that the arbitrators were not bound to examine the witnesses on oath. If it had been intended to make it imperative on them, the order of reference should have been drawn up accordingly, and should have stated that the arbitrators shall examine, &c. The rule must be

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Discharged with costs.

DAVIES *v.* THOMPSON.

Sc. 14 M. & W. 161.

ASSUMPSIT by indorsee against indorser of a bill of exchange, with a count on an account stated.

A plea in abatement for non-joinder should pray judgment of the writ and declaration.

It is not necessary to demur specially to a defective plea in abatement.

1 Wms. Saund. 6th ed. 678

Plea. The defendant by, &c., prays judgment of the said declaration, because he says, that the said supposed promises in the declaration mentioned, were and each of them was made by the defendant, jointly with one A. T., who is still living, and at the time of the commencement of this suit, was and still is resident within the jurisdiction of this Court, to wit, at, &c., and not by the defendant alone; and this the defendant is ready to verify. Wherefore, inasmuch as the said A. T. is not named in the said declaration together with the defendant, he the defendant prays judgment of the said declaration, and that the same may be quashed, &c.

Special demurrer, assigning for cause that the plea ought to have prayed to quash the writ.

Peacock, in support of the demurrer. The object of a plea in abatement is to give the plaintiff a better writ; 1 *Wms. Saund.* 284, n. 4. The plea should, therefore, have prayed to quash the writ as well as the declaration. It is obviously of no avail to quash the declaration independently of the writ, for while the writ is in force, the action is still subsisting, and its pendency might be pleaded in abatement to another suit for the same cause. Under the old process

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in actions commenced by original writs, a plea in abatement concluded with a prayer of judgment of the writ, when the defect was apparent in it; or if the ground of the plea was matter dehors the writ, then the prayer was of the writ and declaration. In like manner where the proceedings were by bill, the plea concluded with a prayer of billa cassetur; *Stephen on Pleading*, App. note 57; *Com. Dig.* tit. "Abatement," (I. 12); *Herries* v. *Jamieson* (*a*); and in such a case, a plea concluding with a prayer of judgment of the writ and declaration, has been held bad; *Attwood* v. *Davis* (*b*). [*Parke*, B.—The question is, whether the Uniformity of Process Act (2 Wm. 4, c. 39) has not altered the law in this respect? The modern writs are merely to compel an appearance, and are required to agree with the declaration in the form of action only, but do not express the whole cause of it, as the old writs did.] The alteration in the form of writs cannot affect the present question; for the objection here is, that the writ itself is defective, inasmuch as it is against one person only, when it should have included two. [*Parke*, B.—Since you cannot now have oyer of a writ, how do we know but that the writ is right?] The declaration, which is against one, must be presumed to follow the writ: if there were a variance it might be set aside for irregularity. In the form given in the last edition of *Chitty on Pleading* (*c*), there is a prayer of judgment of both writ and declaration.

Jervis, contrà. In a note to the same work (*d*), it is said, "According to the form in *Plead. Assist.* 452, the prayer may be of the *writ* only; or according to the form in *Stephen on Pleading*, 5th ed., 54, it may be of the *declaration* only." *Leaves* v. *Bernard* (*e*), is an authority to the same effect. If the writ is right, which, for aught that appears, is the case here, the prayer should be confined to the declaration, in

(*a*) 5 T. R. 553.
(*b*) 1 B. & A. 172.
(*c*) Vol. 3, p. 16, 7th ed.
(*d*) Vol. 3, p. 10, note (*b*), 7th ed.
(*e*) 5 Mod. 132.

order that the plaintiff may be enabled to declare afresh in the proper way.

PARKE, B.—The only mode of reconciling the apparent anomaly in the new process, is by considering the declaration as explanatory of the writ. Where several persons are included in the writ, the plaintiff cannot declare separately against each, but he may declare against some of them in a single declaration, and by so doing he will be considered as having conclusively made his election to sue those only. With respect to the others, it is the same as if their names were struck out of the writ, so that if the declaration were afterwards quashed, there could not, on that writ, be a fresh declaration against all. The effect, therefore, of the declaration, is to limit the operation of the writ, so as to render it a writ against a less number of persons; consequently, if you plead in abatement of such a declaration, the plea should also pray judgment of the writ which the declaration explains. To apply that to the present case, let us suppose that this writ was against one only, where two ought to be joined; then, according to the old authorities, it is clear that the plea should apply both to the writ and declaration; but as it has been long established that no oyer can be had of original writs, it may be said that we do not know but that the writ is right; taking, however, the declaration as explanatory of the writ, and the declaration being bad as against one only, the writ is also bad, inasmuch as its operation is narrowed by the declaration. It follows, therefore, that the fault being both in the writ and declaration, there should be a prayer of judgment of both, and consequently the present plea is bad. There was no occasion to demur specially, as all objections to a plea in abatement are open on general demurrer.

ALDERSON, B.—The object of a plea in abatement in every case, should be to get rid of the whole suit, and for that reason in former times it was pleaded to the writ or to

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the bill, the process by which the suit was commenced. When, therefore, it appears from a plea in abatement, that the plaintiff's action cannot be supported in the form in which it is brought, is it not good sense to quash both the writ and declaration, so as to leave no portion of the suit remaining? If we are to presume anything, we ought to presume that the writ and declaration agree.

ROLFE, B., concurred.

[At the suggestion of the Court it was agreed, that the plaintiff should amend his declaration by inserting the name of A. E. T. as a defendant, the present defendant undertaking for his appearance, and to admit that if it should be proved that he was liable to the plaintiff's demand, A. E. T. was jointly liable with him. No costs on either side.]

Rule accordingly.

S.C. 14 M. & W. 210.

JEFFREYS *v.* EVANS and Others.

An attorney who has received a promissory note on account of costs, may bring an action on the note; although he has not delivered a signed bill: and it is no objection that the note includes future costs.

ASSUMPSIT by payee against makers of a promissory note for 80*l.*, payable three months after date, with interest at 5*l.* per cent.

The plea in substance stated, that the plaintiff was an attorney of the Court of Queen's Bench, and as such attorney had been employed by the defendant, Thomas Evans, to do certain business, and to make disbursements for him; that the note in the declaration mentioned, was made by the defendants, and taken by the plaintiff, for and on account of the fees, charges, and disbursements that then were, and thereafter should become due, from the defendant, T. E., to the plaintiff, for the said business, and for no other consideration whatsoever: that after the passing of the 6 & 7 Vict. c. 73, the plaintiff commenced an action against the defendants, contrary to the form of

the said statute, without having one calendar month before the commencement of the suit, delivered to the defendant, T. E., or sent by the post, &c., a bill of the said fees, charges, and disbursements, subscribed with the proper hand of the plaintiff; that there never was any consideration for making or paying the said note, except as in this plea mentioned.

Special demurrer, assigning for causes (amongst others) that it is no defence to an action on a promissory note, that the note was given for an attorney's fees before any signed bill was delivered: that it is not alleged in the plea that there was any agreement in writing to controul the tenor and effect of the note.

E. V. Williams in support of the demurrer. [*Parke*, B.—Suppose the defendants paid the money, could they get it back again? If not, the plea is no defence to an action on the note.]

Lush was called upon to support the plea. This defence is available at any time before actual payment. The delivery of a promissory note is not of itself payment, and after it becomes due and is dishonoured, the attorney must resort to the original consideration. The 37th section of the 6 & 7 Vict. c. 73, enacts "that from and after the passing of this act no attorney, or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed

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with the proper hand of such attorney or solicitor, (or in the case of a partnership, by any of the partners, either with his own name, or with the name or style of such partnership,) or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill." [*Parke*, B.—You wish to add, "nor shall sue upon any bill or bond, &c., given by way of payment."] This plaintiff is, in truth, maintaining an action for the recovery of his fees, charges, and disbursements. [*Pollock*, C. B.—No: he is only suing upon the security given to him, and which must be considered as given on account; when this bill is taxed, and the whole account taken, these securities will be set off.] As between the immediate parties, the consideration for the note may be disputed. This is not a question as to whether, if the defendants had paid the note, they could recover it back again; but whether there has been a failure of consideration, by reason of the statute preventing the attorney from recovering it. If a party who had taken the benefit of the Insolvent Act, afterwards gave a promissory note for a debt inserted in his schedule, he could not, if he paid the note, recover the money back again; but if he were sued on the note, it would be a sufficient defence that the note was given for a debt inserted in his schedule. [*Parke*, B.—It is clear that the act meant to protect those who chose to avail themselves of its protection. *Pollock*, C. B.—Instead of pleading, the defendants should have applied to tax the bill, and stay proceedings on payment into Court of the sum found due on taxation.] There is another objection that the note was given for future costs, and by analogy to the case of a warrant of attorney, it is void. [*Parke*, B.—That does not vitiate the contract, it is valid unless there is anything in the act of Parliament to make it otherwise. In my opinion there is no question about it.]

PER CURIAM.

Judgment for the Plaintiff.

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SC. 14 M&W. 437.

"Liberum tenementum" is a good plea to trespass for breaking and entering the plaintiff's dwelling-house, though the premises are particularly described in the declaration.

In trespass for breaking and entering a dwelling-house, the allegation "vi et armis" does not imply a forcible entry. - 4. Dtl. 447.

TRESPASS. The declaration stated, that the defendants, on, &c., and on divers other days and times, &c., with force and arms, &c., broke and entered a certain messuage, cottage, or dwelling-house, and a certain garden contiguous to and adjoining the same, situate, lying, and being in a certain place called or known as Nova Scotia Gardens, in the parish of St. Matthew, Bethnal Green, in the county of Middlesex, and which were at the said several times when, &c., in the actual possession and occupation of the plaintiff; and then with force and arms evicted, ejected, expelled, put out and amoved the plaintiff and his family from the possession, occupation, and enjoyment of the same, and other wrongs, &c.

Plea: that the said messuage, cottage, or dwelling-house, and the said garden are, and at the said several times, when, &c., were the messuage, cottage, or dwelling-house and garden, soil and freehold, of the defendants as tenants in common, (setting out their respective interests) wherefore the defendants in their own right at the said several times when, &c., committed the said alleged trespasses, on the said messuage, &c., as they lawfully might for the cause aforesaid.

General demurrer and joinder. The points marked for argument on behalf of the plaintiff were, that the common bar was not admissible in an action for a trespass on the plaintiff's dwelling-house, and that it afforded no justification for a forcible entry thereupon.

Lush, in support of the demurrer. First, the plea of liberum tenementum is not good where the place of the alleged trespass is defined in the declaration. Such a plea has always been considered an anomaly, and is only allowed where the declaration is general, in order that the plaintiff may be compelled to new assign and set out the place,

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either by description or abuttals. This declaration calls the attention of the defendants to the particular premises in which the trespass was committed. In *Lambert* v. *Strother* (*a*), the question arose, whether the plea of liberum tenementum was good, when pleaded to a declaration which described the premises particularly; and *Willes*, C. J., in delivering judgment says, "In order to make the present case intelligible, and to shew the reason of our judgment, I shall consider a little, how these pleas of freehold in actions of trespass came to be at first introduced; for they seem a little absurd, and if they had not prevailed for so many years, but it was at present a new matter before the Court, I should be of opinion that it is not a good plea. For every plea in bar, (admitting the fact that is pleaded to be true) ought to be a full bar to the action; but this is plainly not so; for though the place in question be the defendant's freehold, the plaintiff may have a good cause of action; as if he hold by lease under the defendant, or under another person who conveyed the reversion to the defendant, or even though he has no right at all if he has been in quiet possession a great while, for in that case the person having a right must bring an ejectment and cannot enter upon him by force. But, notwithstanding this, as these pleas have so long obtained, it would be too much to overrule them generally, but I think even still in some cases they ought not to be held to be good pleas. The reason why they were at first introduced seems to be this; anciently most declarations of trespass were general, only for breaking and entering the plaintiff's close in such a place, without giving any name to the close; but now always in this Court, by reason of the rule made Michaelmas 1654, Book of Rules, p. 38 (and I believe most commonly in B. R.) the plaintiffs in their declarations in trespass set forth the names of the closes as the plaintiff has done in the present case. But formerly when a plaintiff only declared generally, it was thought a

(*a*) Willes, 218.

great hardship on a defendant to be obliged to answer such a general charge; for if the plaintiff had a large estate in the township the defendant could not tell in which of the closes he would assign his trespass, and therefore they gave the defendant leave to plead the general issue to oblige the plaintiff to make a new assignment, and ascertain the place in his replication: if he did not, and the defendant pleaded generally, as he might do, that the place in question was his freehold, the hardship would be turned on the plaintiff; for then if the defendant could prove any one place in the township to be his freehold, the plaintiff would be gone, as is expressly held in the case of *Elwis* v. *Lombe*, 6 Mod. 117, 118, and 119. And it is said in that case and likewise in several other cases that when the plaintiff is general in his declaration the defendant shall be allowed to be as general in his plea; these pleas are therefore called common bars, sometimes bars at large, and sometimes blank bars, as in *Cro. Car.* 384, *Cro. Jac.* 594.....That this was the reason of these pleas originally appears from the words of the rule before mentioned, which says that for the future the declaration may mention the place certainly *and so prevent the use and necessity of the common bar and new assignment.* As these were the reasons for admitting such a plea as this, I doubt very much whether this be a good plea in the present case where the plaintiff has named the closes in his declaration. The reasons for this plea do not hold here; there is no hardship on the defendant, and the plaintiff has ascertained the place; nor can the plaintiff make a new assignment in his replication; if he did, it would be a departure in pleading. If therefore it were necessary in this case to give an opinion upon this point, I am inclined to be of opinion, (as at present advised) that the plea is not good." [*Parke*, B.—The plea was always considered an anomaly, but always admitted.] It is not a plea in justification of the alleged trespass, but is only used as the means of compelling the plaintiff to new assign, which he cannot do here. [*Parke*, B.—That makes no

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difference; if the close is mentioned in the declaration, the defendant must prove his title to that particular close; if the close is not mentioned in the declaration, the plaintiff must new assign.] Where the close is not named, the meaning of the plea is this: "I am entitled to enter, as the freehold is mine." [*Parke*, B.—All that can be said is, that one hundred and five years ago, *Willes*, C. J., doubted whether the plea ought to be allowed, and it has been in constant use ever since. In one case the Court of Queen's Bench held, that you cannot go into evidence of title under the plea of "not possessed" (*a*). *Alderson*, B.—The plea would be equally anomalous whether the close is described in the declaration or not; in the one case the defendant says, "I have a close in the parish, and I suppose you are going for that;" in the other he says, "I know the close for which you do go, and that is mine."] It was never intended that this plea should be used for the purpose of raising an issue as to title, its only object being to put in issue the place in which the trespass was committed. [*Parke*, B.—The meaning of the plea is this: "I am entitled to enter because the close is my freehold; should the defendant make out a primâ facie right, the plaintiff must shew a lease if he have one; *Cocker* v. *Crompton* (*b*). If this plea were bad, it would have been demurred to long ago, in order that the parties might exonerate themselves from shewing title. *Platt*, B., referred to *Cooke* v. *Jackson* (*c*).] Secondly, assuming that this plea can be pleaded to trespass quare clausum fregit, it is not a good plea to a declaration for breaking and entering a dwelling-house, and forcibly expelling the plaintiff therefrom. [*Parke*, B.—You assume a breach of the peace: consistently with this declaration, the defendant might have entered when the dwelling-house was empty. On this record you are not in a condition to raise the question argued in *Newton* v.

(*a*) *Whittington* v. *Boxall*, 5 Q. B. 139; S. C. 1 D. & M. 139.

(*b*) 1 B. & C. 489; See S. C. 2 D. & R. 719.

(*c*) 9 D. & R. 495.

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Harland (*a*); if it were intended to rely on a forcible expulsion, that should have been replied. All that the plaintiff would be bound to prove under this declaration, is, that the defendant entered the house.] It is questionable whether the plea justifies all that the plaintiff could prove under the declaration; the plaintiff cannot assign excess, since he cannot tell how much is justified. A distinction has always been made between an entry into a dwelling-house, and an entry upon land; *Rex* v. *Storr* (*b*). [*Parke*, B.—There is no allegation of any breach of the peace.] The allegation that the trespass was committed vi et armis, amounts primâ facie to a charge of a breach of the peace. [*Parke*, B.—No, it only implies that some degree of force was used, sufficient to enable the defendant to get into possession. In order to raise the question before the Court of Common Pleas in *Newton* v. *Harland*, you should have new assigned that the defendant entered in a violent and forcible manner, and in breach of the Queen's peace. The case of *Lawe* v. *King* (*c*), shews that the words "vi et armis," are only matter of form; the omission of which is aided on general demurrer by the statute 27 Eliz. c. 5; and that it is not necessary to give any answer to them in the plea.] In *Leeward and Wife* v. *Basilee* (*d*), which was trespass by husband and wife for an assault and battery of the wife, to which the defendant pleaded son assault demesne, and the plaintiffs replied, that the defendant was going to wound the husband, and that the wife "insultum fecit," to defend him. On demurrer it was argued, that "insultum fecit" was bad, and that the replication should have been "molliter manus imposuit," but the Court held otherwise. There it might have been said that it would not be presumed that the wife used more force than was necessary. The question on this record is, what amount of force is charged against the defendant. [*Parke*, B.—If issue had been taken on the vi et armis, the plaintiff would not be bound to prove any

(*a*) 1 M. & G. 644; See S. C. 1 Scott. N. R. 474.
(*b*) 3 Burr. 1698.
(*c*) 1 Saund. 76.
(*d*) 1 Salk. 407.

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force. Were it necessary to decide the point, I should have no difficulty in saying, that if a freeholder, in order to get into possession of his land, assaults another who is not in legal possession, although the freeholder may be responsible to the public for having committed a breach of the peace, yet he is not liable to the other. I cannot conceive how it is possible to doubt that it would be a good justification to say, that the plaintiff was in possession of the land against the will of the defendant, who was the owner, and that he entered on it, and in so doing committed a breach of the peace. But the question does not arise. *Alderson*, B.—I entirely concur with my Brother *Parke*, and I still retain the opinion which I expressed in *Newton* v. *Harland*.]

Hugh Hill, who was to have argued in support of the plea, referred to *Reeve's History of the Common Law*, vol. 2, pp. 340-343.

PER CURIAM.

Judgment for the Defendants.

M'LEOD and Another, Assignees of PITCAIRN, a Bankrupt, *v.* SCHULTZE and Another (*a*).

Assumpsit by the assignees of P., a bankrupt, on a policy of insurance made by P. before his bankruptcy.

ASSUMPSIT on a policy of insurance of a ship and goods for 2000*l.*, made by one Pitcairn, before his bankruptcy, with the Forth Marine Insurance Company, of which the defendants were directors.

(*a*) See this case, on demurrer to the plea, *ante*, vol. 1, p. 614.

Plea as to 78*l.*, that the policy was made in Scotland, that the said sum was duly fenced and arrested according to the law of Scotland, at the suit of G., for a debt due to him; that thereupon the said sum became and was, according to the law of Scotland, in custody of the law; that afterwards G. obtained judgment, which was final and conclusive against P. and the plaintiffs as his assignees; and that by the law of Scotland all right and claim of P. to the said sum have been, and still are, by reason of the premises, wholly barred, defeated, and destroyed; and the plaintiffs, as assignees, never acquired any right or title thereto.

Replication, that the defendants broke their promise of their own wrong; without this, that all right and claim of P. to the said sum is wholly barred, and that the plaintiffs, as assignees, never acquired any right or title thereto: *Held* bad for duplicity.

Plea. As to 78*l.* 14*s.*, parcel of the said sum of 2000*l.*, that the said policy of insurance and promise were made and entered into in that part of the United Kingdom of Great Britain and Ireland called Scotland, to wit, at Leith, and that at the time of the making and entering into the same, and thence continually hitherto, the defendants were and have been and still are resident and domiciled in Scotland, to wit, at Leith, and within the jurisdiction of her Majesty's Court of Session in Scotland: that after the time of the happening of the alleged loss and damage, and before the commencement of this suit, and before the said T. Pitcairn became bankrupt, to wit, on, &c., the said sum of 78*l.* 14*s.* was duly fenced and arrested according to the law of Scotland, in the hands of the Forth Marine Insurance Company, and of the defendants as such members and directors thereof, by and at the suit of a certain company or copartnership, established and carrying on business in Scotland aforesaid, by and under the name of the Glasgow Marine Insurance Company; that is to say, by virtue of a certain warrant or letter of arrestment of our Sovereign Lady the Queen, then issued out of and by her said Court of Session in Scotland aforesaid, at the instance of the said Glasgow Marine Insurance Company, in a certain suit commenced and then depending in her said Majesty's Court of Session in Scotland aforesaid, in which the said Glasgow Marine Insurance Company were the pursuers, and the said T. Pitcairn was the defender, for the recovery of a certain debt of 78*l.* 14*s.*, then due and owing by the said T. P. to the said Glasgow Marine Insurance Company, and which said sum of 78*l.* 14*s.*, parcel, &c., was so fenced and arrested as aforesaid, to remain in the hands of the said Forth Marine Insurance Company, and of the defendants as such directors and members thereof, under sure fence and arrest, aye and until sufficient caution should be found acted in the books of Council and Session, that the same should be made forthcoming to the said Glasgow Marine Insurance Company, pursuers as aforesaid, as

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accorded of law; that thereupon the said sum of 78*l.* 14*s.*, parcel, &c., became and was, according to the law of Scotland, and hath ever since continued, in the custody of the law, and subject in all respects to the order and determination of her Majesty's Court of Session in Scotland aforesaid: that such proceedings were afterwards had in the said last-mentioned suit, that afterwards, and before the commencement of this suit, to wit, on, &c., the said Glasgow Marine Insurance Company, as such pursuers as aforesaid, obtained a final judgment and decree of and in the said Court of Session in Scotland aforesaid, in the said suit, whereby the said Court, to wit, the Lords of her Majesty's Council and Session in Scotland, did decree and ordain the said T. P. to make payment to the said Glasgow Marine Insurance Company, of the sum of 78*l.* 14*s.* sterling money of Great Britain, with the legal interest thereof, &c.: that the said debt of 78*l.* 14*s.* was justly due and owing by the said T. P. to the said Glasgow Marine Insurance Company, at the time of the commencement of the said suit; and that the said Court had jurisdiction in and over the said suit and the subject-matter thereof, and that the said suit and the proceedings therein were duly and regularly prosecuted and conducted, according to the law and practice of the said Court of Session, and according to the law of Scotland aforesaid; and that the said warrant or letter of arrestment and judgment, were and are respectively final and conclusive against T. P. and the plaintiffs as his assignees; and that by virtue of and according to the law of Scotland, and by the said arrestment, the defendants were and hitherto have been and still are liable to make forthcoming and to pay, to the said Glasgow Marine Insurance Company, the said sum of 78*l.* 14*s.*, parcel, &c., and that by the law of Scotland at the time when the said T. P. became bankrupt, he the said T. P. was not entitled to have or recover the said sum of 78*l.* 14*s.*, parcel, &c., and that the said plaintiffs as such assignees, were and have been always from the time of the making of the said arrestment,

hitherto and still are by the law of Scotland, wholly prevented and precluded from claiming, suing for, or recovering the said sum of 78*l.* 14*s.*, parcel, &c., and that by the law of Scotland aforesaid, all right and claim of the said T. P. in or to the said sum of 78*l.* 14*s.*, parcel, &c., were before and at the time of the commencement of this suit, and before and at the time when the said T. P. became bankrupt, and thence hitherto have been and still are by reason of the premises, wholly barred, defeated, and destroyed; and the plaintiffs as assignees as aforesaid, never acquired any right or title thereto, or to any part thereof: that the said debt so recovered by the said Glasgow Marine Insurance Company in manner aforesaid, is still unpaid, and that before and at the time of the commencement of this suit, the defendants were, and thence hitherto have been and still are by the law of Scotland, liable and bound to pay the said sum of 78*l.* 14*s.*, parcel, &c., to the said Glasgow Marine Insurance Company, in discharge of the said debt so recovered by them; and that by making payment to the plaintiffs of the said sum of 78*l.* 14*s.*, parcel, &c., or of any part thereof, they the defendants would be guilty of a contempt of the said Court of Session, and not only liable to punishment, but would also be compelled to pay the full amount of the said sum of 78*l.* 14*s.*, parcel, &c., to the said Glasgow Marine Insurance Company. Verification.

Replication: that the defendants broke their promise in that behalf of their own wrong: without this, that all right and claim of the said T. P. in or to the said sum, is wholly barred, defeated, and destroyed; and that the plaintiffs as assignees as aforesaid, never acquired any right or title thereto: concluding to the country.

Special demurrer for duplicity.

Bovill, in support of the demurrer. It is difficult to say what is the precise issue raised by this replication. The previous part of it puts in issue the whole plea, while the special traverse only raises a question as to whether the

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claim of Pitcairn was barred, or his assignees ever acquired any title to the money. It is a rule of pleading, that the "absque hoc" can only be used where the inducement amounts to an argumentative denial of some matter alleged. But here the inducement contains a direct and positive denial of the facts stated in the plea, and the traverse under the absque hoc is quite immaterial. Is the trial to take place on the inducement, or on the special traverse? [The Court called on]

Cowling, to support the replication. The several facts alleged in the plea constitute but one ground of defence, and are properly put in issue by this form of replication. The allegation that the defendants of their own wrong broke their promise, only denies the facts alleged prior to the averment that Pitcairn was barred. [*Platt*, B.—Is not the latter part of the replication like a denial of the "virtute cujus?"] The issue would be upon the whole plea. The defendant would have to make out a proposition consisting of two parts: first, that Pitcairn was barred; secondly, that his assignees were barred. It might be that although Pitcairn was barred, yet his assignees were not prevented from suing; or that although his assignees were barred in Scotland, yet they might maintain an action in England; *De la Vega* v. *Vianna* (*a*). The real question could not be raised except under this form of replication. If it consisted of the traverse only, the other parts of the plea would be admitted. [*Parke*, B.—The effect of the replication is to put these facts in issue, namely, the Scotch law; that Pitcairn was subject to the Scotch law; and that the Scotch law was such as to bar not merely Pitcairn, but also his assignees.] The replication denies all the premises by which it is attempted to be shewn that the defendants are discharged. [*Parke*, B.—You had better amend on the usual terms.]

Amendment accordingly.

(*a*) 1 B. & Ad. 284.

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Sc. 14 M & W. 449.

To a declaration on the money counts, the defendant pleaded in abatement, that he was an attorney of the Court of Queen's Bench, concluding with a verification. The plaintiff replied that the defendant was also an attorney of the Court of Exchequer, concluding with a verification: *Held*, on general demurrer, that the replication was good in substance.

Semble, that both plea and replication should have concluded with a verification by the record.

THE declaration in this case contained the common money counts.

Plea in abatement, that defendant was an attorney of the Court of Queen's Bench: concluding with a verification (*a*).

Replication, that defendant was also an attorney of the Court of Exchequer: concluding with a verification.

General demurrer and joinder.

Atkinson, in support of the demurrer. The replication is bad in substance and in form. It appears to be founded on one or other of these two principles: first, that the subject has a common law right to sue in any Court he pleases, and that such right is paramount to any prescriptive right which the defendant may have to be sued elsewhere; or secondly, that there is an inherent right in the Court itself to have prior seisin of the suit when the defendant is an officer of the Court, in which the action is brought. But neither proposition can prevail against the prescriptive right set out in the plea, and admitted by the replication; for such right derogates from, or overrides any general or common law right, either of the Court or suitor. It is conceded, that if both plaintiff and defendant are privileged, and so in æquali jure, the privilege of the defendant would have been gone; for privilege pleaded against privilege, would have set the matter at liberty, and then the Court, which first had seisin of the suit, must have prevailed; *Guy* v. *Reynell* (*b*); *Clapham* v. *Lenthall* (*c*); *Vin. Abr.* tit. "*Privilege*" (F.); *Danser* v. *Berryman* (*d*). No replication to a plea of this kind can be good, unless based upon such an antagonist privilege.

(*a*) As in precedent, 3 Chit. on Plead. 715, 6th ed.

(*b*) 2 Brownl. & G. 266.

(*c*) Hardres, 365.

(*d*) 2 W. Bl. 1325.

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[*Parke*, B.—Ought not the plea to have gone on to aver that the defendant was not an attorney of this Court?] It has been expressly decided, that such averment is unnecessary (*a*). Secondly, the replication is bad in form, for it should have concluded with a prout patet per recordum, and not with the ordinary verification. Since the 6 & 7 Vict. c. 73, s. 2, the fact of a person being an attorney is matter of record; and, therefore, the issue as to that fact must be tried by the record, and not by the country; *Rex* v. *Banbury* (*b*). [*Platt*, B.—That objection applies also to the plea.]

Pashley, contrà. In ancient times there was a reason for allowing this privilege to an attorney of the Court of Queen's Bench, viz., because that Court was not stationary at Westminster, but might be held at any place in the kingdom, and every officer was bound or presumed to attend it. But that reason has ceased, and with it the privilege. If this replication be held bad, the consequence would be that an attorney could not be sued at all; for if he happened also to be an attorney of the Court of Common Pleas, he might plead that in answer to another action commenced in the Court of Queen's Bench. The objection to the form of replication is not available on general demurrer.

Atkinson, in reply. The reason for allowing the privilege still remains; for there is no act of Parliament which requires the Court of Queen's Bench to sit in Westminster Hall, and the Queen might (if she thought fit) command it to follow her, ubicunque fuerit in Angliâ. If, therefore, the ambulatory nature of the Court was the true origin or cause of the privilege, there is still a valid reason for its continuance.

(*a*) *Percival* v. *Cook*, 5 M. & W. 293; S. C. 7 Dowl. 500; *Hunter* v. *Neck*, 3 M. & G. 181; S. C. 3 Scott. N. R. 448.

(*b*) Skin. 521.

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Besides, the venue of the Court of Queen's Bench being transitory, and the venue of this Court local, as appears from the forms of the modern writs and old entries; there is a distinction between a privilege claimed in the one Court and the other. With respect to the conclusion of the plea, pleadings in abatement are not within the 4 & 5 Ann. c. 16; and, therefore, the formal objection may be taken on a general demurrer; *Lloyd* v. *Williams* (*a*).

PER CURIAM (*b*).—The objection as to the informal conclusion of the replication applies equally to the plea. But we think the replication good in substance. The defendant being an attorney of both Courts, the plaintiff may choose in which Court he will sue him. There must, therefore, be judgment for the plaintiff.

Judgment quod respondeat ouster (*c*).

(*a*) 2 M. & S. 484.

(*b*) *Parke*, B., *Rolfe*, B., and *Platt*, B.

(*c*) See *Rastrick* v. *Beckwith and Others*, *ante*, vol. 2, p. 624.

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S.C. 14 M. & W. 235.

Where a statute requires certain qualifications in persons acting under it, and provides that in an action for penalties for acting without qualification, the defendant shall prove that he was duly qualified, it is sufficient to allege in the declaration that the defendant was not qualified, without specifying in what his disqualification consisted.

Since the rule of H. T., 4 Wm. 4, r. 8, the venue is the county for all purposes: therefore, in declaring for a penalty, it is not necessary to aver that the offence was committed within the county in which the venue was laid.

4 Dowl. 178.

DEBT for penalty. The second count of the declaration stated, that the defendant, after the passing of an act of Parliament, made and passed in the fifth year of the reign of Queen Victoria, entitled "An Act for improving the streets and public places, and erecting a town hall, and improving the markets, in the township of Blackburn, in the county palatine of Lancaster," (4 & 5 Vict. c. 112, local and personal, public) to wit, on &c., acted as a com-

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missioner in the execution of the said act, although he was not at the time of his acting as such commissioner, duly qualified to act as a commissioner in the execution of the said act; contrary to the form of the statute in such case made and provided; by means whereof actio accrevit, &c.

Special demurrer, assigning for cause, that the count does not show in what respect or on what ground the defendant was not duly qualified to act as a commissioner, or of what his qualification should have consisted; also, that the count is double, inasmuch as there being several grounds of disqualification mentioned in the statute, the plaintiff by stating generally that the defendant was not duly qualified to act as a commissioner, involves the whole of them in the issue; notwithstanding the defendant was liable to the penalty, if disqualified on one ground only: also that it does not appear that the offence was committed or the penalty incurred within the county where the venue was laid.

Martin, in support of the demurrer. The declaration is bad, for the causes assigned. The 9th section of the 4 & 5 Vict. c. cxii., enacts, "that every male person of the age of twenty-one years, being a resident member within the said town of Blackburn, or within three miles of any part of the boundary thereof, and either being rated to the rate made for the relief of the poor of the same township in the annual sum of thirty pounds or upwards, or being seised or possessed or in the enjoyment for his own use, of the rents and profits of lands and hereditaments within the said township of the annual value of thirty pounds for an estate not less than a life in being, or for a term of years of which not less than twenty-one years shall be unexpired, and whether determinable on a life or lives or not, shall be a commissioner for carrying this act into execution." The 18th section enacts, that at the meeting of commissioners, at which any person shall first attend as one of such commissioners, such person shall make and subscribe the declaration therein

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required. Then follows the section upon which the present action is founded. The 19th section enacts, "that if any person shall act as a commissioner being incapacitated to act, or not being duly qualified, or before he shall have made or subscribed such declaration as aforesaid, or after having become disqualified, he shall for every such offence forfeit the sum of fifty pounds; and such penalty may be recovered with full costs of suit, in any of her Majesty's Courts of record at Westminster, by any person who shall sue for the same by action of debt or on the case, and in every action for the recovery of such penalty the person so sued shall prove that he was qualified, and had made and subscribed the declaration aforesaid, or he shall pay the said penalty and costs, without any other proof or evidence on the part of the plaintiff than that such person hath acted as a commissioner in the execution of this act." The qualification is threefold; the person must be of age, resident within the township, and rated to the poor in the annual sum of thirty pounds, or possessing certain property. This declaration is too general, it alleges, that the defendant having *none* of those requisites has become liable to the penalty. It ought to specify the particular ground of disqualification upon which the plaintiff relies. The effect is to impose considerable hardship on the defendant, for if the plaintiff fail as to one ground, he may resort to another. In *Stephen on Pleading* (*a*), it is said, with respect to the rule, that pleadings must not be double. "This rule applies both to the declaration and subsequent pleading. Its meaning with respect to the former is, that the declaration must not in support of a single demand allege several distinct matters, by any one of which that demand is sufficiently supported." [*Parke*, B.—This declaration is enough to bring the case within the act of Parliament; especially as, by the same section which im-

(*a*) Page 279, 4th ed.

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poses the penalty, the burden of proof is cast on the defendant. *Pollock*, C. B.—The act says, that any person may be sued, and that then he must prove his qualification; your construction of the act would limit the proof to one particular]. It would be clearly a bad count to allege that the defendant acted as a commissioner, and that he was not twenty-one years of age, or that he did not reside in the borough; or that he was not rated to the poor. This declaration is in effect the same. [*Parke*, B.—In debt on the Game Acts, the declaration never stated in what way the defendant was not qualified]. Secondly, the declaration is defective, in not alleging that the defendant acted within the county. [*Parke*, B.—Is not that cured by the rule of Court (*a*), which makes the venue the county for all purposes]. That rule does not affect the statutes 31 Eliz. c. 5, and 21 Jac. 1, c. 4. [*Pollock*, C. B.—Those statutes are satisfied, if it is averred, that the offence was committed within the county. As the venue is now the county, it is so averred in this declaration. *Parke*, B.—You had better amend.]

Amendment accordingly.

(*b*) Reg. Gen., H. T. 4 Wm. 4, part II. r. 8.

BELCHER *v.* MAGNAY and Others.

Where a verdict has been found for one of several defendants, and against the others, and the latter apply to set it aside; the rule should call on the successful defendant, as well as the plaintiff, to shew cause.

IN this case a verdict had been found for one of several defendants, and against the others. The latter afterwards obtained rules, calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a new trial had.

On the rules coming on for argument,

Watson, (with whom was *Humfrey*), objected to the form of the rules, on the grounds, first, that they only proposed

to set aside part of the actual finding; and, secondly, that the defendant in whose favour the verdict had been found was entitled to be heard, before the Court could disturb the verdict. He cited *Doe d. Dudgeon* v. *Martin* (*a*), in which it was held that the Court could not on motion grant a new trial as to one defendant, where a verdict has been found against him, and for the other defendants.

The COURT directed the rules to be amended, by calling on the defendant in whose favour a verdict had been found, as well as the plaintiff, to shew cause why the verdict should not be set aside.

(*a*) *Ante*, vol. 2, p. 678; See S. C. 13 M. & W. 811.

ECCLES and Another *v.* HARPUR. *SC. 14 Jur. W. 248.*

Where a rule is made absolute for a new trial, and no mention is made of the costs of the rule, neither party is entitled to them.

THIS was a rule calling on the defendant to shew cause why the Master should not review his taxation. The action was brought on a policy of insurance, and a verdict found for the plaintiff. The defendant obtained a rule nisi to set aside the verdict, and for a new trial, which rule was afterwards made absolute, "the costs to abide the event," (no mention being made as to the costs of the rule). On the second trial a verdict was found for the defendant, and the Master allowed him the costs of the rule.

Martin shewed cause. The party who eventually succeeds upon a new trial is entitled to the costs of the rule for that purpose. In *Pugh* v. *Kerr* (*a*), *Alderson*, B., says, "the costs of all interlocutory proceedings, (which are not otherwise provided for), are costs in the cause, and this is certified to us by the Masters of all the Courts, as being the

(*a*) 8 Dowl. 219; S. C. 6 M. & W. 17.

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understood practice." *Austen* v. *Gibbs* (*a*) will perhaps be cited on the other side.

Crompton, contrà, was not called upon.

POLLOCK, C. B.—The word "costs" means costs of the cause. Where a rule is made absolute for a new trial, and nothing is said about the costs of the rule, neither party is entitled to them.

Rule absolute.

(*a*) 8 T. R. 619.

S.C. 14 M & W. 239.

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A sheriff who takes in execution a lease for years has no right to remain on the premises for the purpose of executing an assignment, and putting the purchaser in possession. If he should do so, he is liable in trespass at the suit of the execution debtor, if in possession; although the premises have been sold and transferred.

Where a lease is taken in execution by the sheriff, the interest in it remains in the execution debtor until actual assignment to the purchaser.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and continuing therein for a long space of time, to wit, for three months; and seizing his goods.

The defendants pleaded, first, not guilty; secondly, that the dwelling-house in the declaration mentioned, was not the dwelling-house of the plaintiff; thirdly, a justification as sheriff, under a writ of fieri facias issued on a judgment against the plaintiff, by virtue of which writ the defendants, as sheriff, at the said time, when, &c., seized and took a certain lease or instrument of demise in writing, under and by virtue of which the plaintiff held and was possessed of the said dwelling-house, as in the declaration mentioned, for a certain term, to wit, the term of ten years; that afterwards and before the return of the writ, the defendants sold the same and the plaintiff's said interest in the said term, and continued in possession of the said dwelling-house for the further execution of the said writ, and committed the said alleged trespasses under and by virtue of the said writ, &c.

The plaintiff joined issue on the two first pleas, and to the third, replied by way of new assignment, that after the defendants had seized and taken in execution, and sold the said lease as in the said plea mentioned, and after the expiration of a reasonable time for selling the same, the defendants did not depart from the said dwelling-house; but on the contrary thereof, the defendants, on the several days and times in the declaration mentioned, the same being after the defendants had seized and taken in execution and sold as aforesaid, and after the expiration of such reasonable time as aforesaid, broke and entered the said dwelling-house, and stayed therein for a long space of time, to wit, three months.

To this new assignment the defendants pleaded, first, not guilty; secondly, that at the time of committing the said trespasses, the said dwelling-house was not the dwelling-house of the plaintiff, modo et formâ.

At the trial before *Pollock*, C. B., it appeared that the plaintiff's interest in the lease had been seized by the sheriff under a fieri facias, and sold by auction; but no assignment had been made by him to the purchaser.

The jury found the three first issues for the plaintiff, with 10*l.* damages, and for the defendants on the second plea to the new assignment, leave being reserved to the plaintiff to move to enter a verdict for him on that issue.

A rule nisi having been obtained accordingly,

Jervis and *Kennedy* shewed cause. The defendants, as sheriff, were justified in remaining on the premises for the purpose of perfecting the sale by delivering possession to the purchaser. In *Taylor* v. *Cole* (*a*), *Buller*, J., says, "It seems to me that where there is a tenant in possession, and the execution is against the landlord, whose term is to be sold, the tenant cannot be turned out of possession: but it

(*a*) 3 T. R. 298.

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is very different from the present case, where the debtor himself is in possession. In such case I incline to think that the sheriff may turn him out of possession." [*Pollock*, C. B.—With respect to goods, after seizure by the sheriff and before actual sale, the goods are in custodiâ legis; suppose at that time the goods were taken by a third party, could not the execution debtor maintain an action?] Bare possession would be sufficient as against a wrong doer, but a person having title might justify. This term of years is a chattel interest, and, by analogy to the case of goods, the moment the sheriff has sold it, the title of the execution debtor is divested. If the word "sold" means a perfect assignment, it is clear that the plaintiff has no right of action; but if it means only a sale not perfected by assignment, then the property is in the sheriff. [*Alderson*, B.—A sale by a sheriff is not complete until assignment.] For some purposes the property in goods seized remains in the debtor until actual sale; *Giles* v. *Grover* (*a*). Suppose the question had arisen between landlord and tenant, the mere fact of the latter being in possession after the expiration of his term would not have enabled him to maintain trespass against his landlord who entered; *Taunton* v. *Costar* (*b*): unless, indeed, he expelled the tenant by force; *Newton* v. *Harland* (*c*). A party having the legal title may after entry maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards; *Butcher* v. *Butcher* (*d*). If the sheriff sells a term of years and then goes out of office, he may nevertheless execute an assignment; *Doe d. Stevens* v. *Donston* (*e*). The term must exist in some person, it cannot be in the execution debtor, because it is taken out of him by the law; it cannot be in the purchaser, because

(*a*) 9 Bing. 128; See S. C. 2 M. & Scott, 197.
(*b*) 7 T. R. 431.
(*c*) 1 M. & G. 644; See S. C. 1 Scott. N. R. 474.
(*d*) 7 B. & C. 399; See S. C. 1 M. & R. 220.
(*e*) 1 B. & A. 230.

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there is no assignment to him; it follows then that it must be in the sheriff. [*Alderson*, B.—If the property is in the sheriff, it would require an assignment to get it back again if the execution were set aside.] The sheriff's title is paramount to that of the debtor, and can only be divested by assignment, or supersedeas of the execution. A debtor whose goods are seized cannot maintain trespass against the sheriff for anything done by him to the goods, between the time of seizure and sale; the same rule of law will apply to a term of years. [*Alderson*, B.—If the property passes by the assignment from the execution debtor to the vendee, it cannot be in the sheriff. Is the sheriff anything more than an instrument for transferring the property from the debtor to the vendee? if so, the house remains the house of the debtor, until it becomes the property of the vendee.] The sheriff has a twofold duty to perform; first, to remain in the house for the purpose of selling the term to the best bidder; and secondly, to transfer it to the purchaser. It is true that any sort of possession is sufficient to support trespass as against a wrong doer; but in this case the sheriff cannot be considered a wrong doer, for he is obliged to be in the house for the purpose of executing his duty under the writ; and the case of *Doe d. Stevens* v. *Donston*, shews that he is not obliged to assign at the time of the sale. [*Platt*, B.—The case of *The King* v. *Deane* (*a*), is against you; there it was held that a sheriff who sells a lease or term of years under a fi. fa., cannot put the person out of possession and the vendee in; but that the latter must bring his ejectment.] That must be understood of a forcible expulsion; for in *Taylor* v. *Cole* (*b*), it was determined that the sheriff may justify expelling the defendant peaceably. They also referred to *Com. Dig.* tit., "*Execution*," (C. 6); *Hey* v. *Moorhouse* (*c*); *Harrison* v. *Dixon* (*d*).

(*a*) 2 Show. 88.
(*b*) 3 T. R. 298.
(*c*) 6 Bing. N. C. 52; See S. C. 8 Scott, 156.
(*d*) *Ante*, vol. 1, p. 454; See S. C. 12 M. & W. 142.

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Humfrey (with whom was *Peacock*), to support the rule, referred to *Browne* v. *Dawson* (*a*), and was stopped by the Court.

POLLOCK, C. B.—The rule must be absolute. The question is, whether the plaintiff or defendants be entitled to a verdict on the second plea to the new assignment, which is pleaded to the third original plea? (His Lordship then stated the pleadings.) It seems to me to make no difference whether the word "sold" is to be understood as an actual assignment by the sheriff to the purchaser, or only as an inchoate act, done by putting up the premises for sale, the transfer not being perfected; because in the case of an actual transfer, the sheriff having performed all that is required of him, is functus officio, and has no right to stay on the premises. If, on the other hand, the word sale is to be understood not as an actual assignment, undoubtedly the house was still the plaintiff's, as the property in it had not passed out of him. I cannot accede to the suggestion that the term vested in the sheriff. It is clear that the term remained in the original lessee, until an actual assignment by the sheriff. I therefore think the rule must be absolute.

ALDERSON, B.—I am of the same opinion. The plaintiff complains against the sheriff that he remained in the house a longer time than was reasonable for the purpose of executing the writ, and after he sold the property. The sheriff says, "I did not remain an unreasonable time," (which is found against him) "and though I did remain, it was not the plaintiff's house." The question then is, whether the house is the plaintiff's house as against the sheriff, who clearly has no right to be there after he has disposed of the premises? The sheriff has a right to remain for the purpose of executing the writ, but not after the

(*a*) 12 A. & E. 624; See S. C. 4 P. & D. 355.

property is sold. If there were an assignment to the purchaser, the sheriff does not claim to act under him, and, therefore, had no right to remain on the premises; if there were no assignment, the property remains in the plaintiff.

ROLFE, B.—I am of the same opinion. The language of the plea is, that "afterwards and before the return of the writ, he sold the premises with the plaintiff's interest in the term." The first question is, what is the meaning of the word "sold?" In my opinion it means "bargained and sold." I do not understand how in law there can be a sale of a chattel real, otherwise than by an instrument under seal; anything but that is only a contract of sale. The word "sold" must, therefore, mean "sold" in the only sense in which the law would adopt it, namely, a complete bargain and sale. The plea does not, indeed, say to whom, and might perhaps, for that reason, be subject to special demurrer. The defendants, therefore, having sold and assigned, (for that is the meaning of the plea) the plaintiff says, that after the defendants seized and sold, they remained on the premises an unreasonable time. The answer to that is, that the dwelling-house was not the dwelling-house of the plaintiff. I think that position is not made out; it was the dwelling-house of the plaintiff when the sheriff began to execute the writ. I come to the conclusion which I have formed, by considering how the case would have stood if no goods had been in the dwelling-house, and the sheriff had had nothing to do but to sell the lease, would that authorize him to enter the house? Certainly not; for the dictum of *Buller*, J. (*a*), which has been cited, is not stated with much confidence, nor was it necessary for the decision of the case. It is said that it has never been overruled,—but has it ever been acted on? It would be strange if under a fieri facias a sheriff should be able to execute an habere facias possessionem. The proper course

(*a*) In *Taylor* v. *Cole*, 3 T. R. 298.

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is to sell, that is, to give the purchaser a right of possession, which, if he be opposed, he must enforce by ejectment.

PLATT, B.—This is an action for breaking and entering the plaintiff's dwelling-house. The defendants justify under a writ of fieri facias, and to that plea there is a new assignment, putting entirely out of the question all the facts stated in the plea. That new assignment in effect is, that after the execution of the writ, and after the expiration of a reasonable time, the sheriff again entered the plaintiff's dwelling-house. To that the defendants plead that the plaintiff was not possessed of the dwelling-house. The question therefore is, whether under these circumstances the plaintiff was possessed of this dwelling-house as against the sheriff. Unless the sheriff can say "because I have sold this lease, and have not assigned it, I have a right to go upon the premises," he is a trespasser as much as any third person who might have entered. Could any third person have entered on the premises, and say that the plaintiff was not in possession of the house in question, because the sheriff had been there before, and sold the lease? If a stranger could not, why could the sheriff? Perhaps he might have a right to enter for the purpose of taking the lease, or in furtherance of the sale, provided he does not stay there; but the fact of having sold the premises, does not entitle him to remain; if it did, he might always keep possession, by refusing to assign. Though the property has been sold, it seems to me that as against the sheriff, the plaintiff must be considered the owner. It has been urged in argument, that the sheriff has a right to put the vendee in possession, and on referring to *Tidd's Practice* (*a*), I find it so laid down, and the authority which is cited for that position is *Taylor* v. *Cole* (*b*). But that case is certainly no authority. Nobody can doubt that if

(*a*) See *Tidd's Pract.* vol. 2, p. 1004, 9th ed.
(*b*) 3 T. R. 298.

the execution debtor consents to go out, and the sheriff puts the vendee in possession, leave and license would be an answer.

Rule absolute.

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In re COBBETT.

WILLIAM COBBETT had been originally committed to prison for a contempt in not putting in an answer to a bill filed on the equity side of this Court by one Oldfield. When the equity jurisdiction of this Court was abolished, Cobbett was detained in custody by order of the Court of Chancery, to which Court the cause was transferred. In Easter Term last, this Court, on the application of Cobbett, granted a rule for the issuing of a writ of habeas corpus ad subjiciendum, and required that notice thereof should be given to Oldfield. On the return of the writ, Oldfield appeared and opposed Cobbett's discharge, when the Court remanded him to his former custody, and ordered him to pay the costs.

Where the Court directs a writ of habeas corpus ad subjiciendum to issue, with notice to a party interested in opposing the prisoner's discharge, and the latter is remanded to his former custody, the Court do not allow the costs of the opposition.

Pashley had obtained a rule nisi to rescind so much of that rule as related to the payment of costs; against which

Martin shewed cause. The Court has the same power to award costs in this case as in any other rule. [*Rolfe*, B.—Oldfield was not bound to appear: he was only placed in a position to do so if he thought proper.] It was necessary for the purposes of justice that he should appear. [*Rolfe*, B.—The Court might have decided on the inspection of the warrant.]

Pashley, in support of the rule, submitted that in a case like the present, the Court of Queen's Bench never allowed costs.

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ALDERSON, B.—We are disposed to adhere to the practice of the Court of Queen's Bench, and have sent to inquire what it is; the officer reports that costs are never given in such cases. The rule must be absolute.

PER CURIAM.

Rule absolute.

Sc. 14 M&W. 295.

LUMLEY *v.* DUBOURG.

A plaintiff being under a peremptory undertaking to try at a particular sitting, entered his cause accordingly; but in consequence of the press of business it was made a remanet: *Held*, that there was no default on the part of the plaintiff. And the defendant having obtained a rule absolute for judgment as in case of a nonsuit, the Court set it aside.

4 Dowl. 106
— 272
— 591
5 — 809

IN this case a rule nisi for judgment as in case of a nonsuit had been discharged, upon the plaintiff's giving a peremptory undertaking to proceed to trial at the London sittings after Easter Term. The plaintiff accordingly gave notice of trial, entered the cause, and carried in the record in due time. The cause was made a special jury, but it was expressly sworn that it was not for the purpose of delay. Two days only were appointed for the sittings, and from press of business, the cause could not be tried, and was marked in the Marshal's book as a remanet to the sittings after the present Trinity Term. The defendant, on the second day of this Term, obtained a rule absolute for judgment as in case of a nonsuit, upon the usual affidavit that the plaintiff had made default, and had not proceeded to trial pursuant to his peremptory undertaking. Judgment having been signed,

Barstow, on the 29th of May, obtained a rule calling on the defendant to shew cause why that rule should not be discharged, and the peremptory undertaking enlarged to the sittings after the present Term. On shewing cause, affidavits were produced on behalf of the defendant, which stated that notice of trial was given on the 2nd of May, but that the cause was not entered for trial until the 8th of May, which was the last day for entering causes for trial at

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those sittings: that the cause was number twenty on the list, and that only five causes remained undisposed of at those sittings: that although the rule for a special jury was obtained on the 9th of May, it was not served until the 12th, and that no appointment to nominate a jury had been served.

Ogle shewed cause. The plaintiff not having performed his undertaking, the defendant was entitled to judgment. A peremptory undertaking is an undertaking to try absolutely. It is only allowed to be given by favour of the Court, at the time when, in strictness, the defendant has a right to judgment as in case of a nonsuit. Besides, the affidavits shew that the plaintiff has not used due diligence in expediting the trial of the cause; for, by delaying to enter it until the last day, it necessarily stood low in the list, and, in addition to that, he has impeded the trial by making the cause a special jury. There are two authorities expressly in point. In *Ward* v. *Turner* (*a*), a rule nisi for judgment as in case of a nonsuit was discharged, on a peremptory undertaking by the plaintiff to try at the then next Summer Assizes. The plaintiff took down the cause for trial pursuant to his undertaking, but in consequence of the sudden illness of the Judge, the cause could not be tried, and was made a remanet. The plaintiff made no application to enlarge his peremptory undertaking, but after giving notice of trial for the ensuing Spring Assizes, withdrew the record. In the following Easter Term, the defendant obtained a rule absolute for judgment as in case of a nonsuit, and a rule nisi having been granted to set aside that judgment, *Coleridge*, J., in delivering judgment, said, "here the plaintiff had failed to take the cause down for trial, and had been in default, and the defendant consequently had his right to his remedy under the statute, and had a rule nisi accordingly. That

(*a*) 5 Dowl. 22.

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rule was discharged, not because it was improperly obtained, but on condition of the plaintiff undertaking to try the action at the next assizes. Then comes the question whether there was any default on the part of the plaintiff at the next assizes. In one sense there was none, as there was no moral fault, and no neglect on his part; but in the sense of a condition, it was a peremptory undertaking to be responsible, though he had no control over the circumstances which prevented the trial. The plaintiff should have applied in Michaelmas Term to enlarge his peremptory undertaking, and, if that had been done, no doubt the Court would have looked into all the facts of the case. The only use of the subsequent default is to see how far the plaintiff may be excused, and whether he is entitled to any extension of time. I think, therefore, that the case of *Gilbert* v. *Kirkland* (*a*) does not apply, and that it was not an irregularity for the plaintiff to sign judgment as in case of a nonsuit, two Terms after." That case was referred to, and its authority recognised, in a recent case in the Common Pleas; *Petrie* v. *Cullen* (*b*). There the plaintiff was under a peremptory undertaking to try at the sittings after Trinity Term. The 11th of June was the last day for entering causes for the sittings; and it appeared from the affidavits on the part of the defendant, that the plaintiff did not enter his cause till just before the closing of the office, in the evening of that day. At the sittings, the cause was made a remanet, but it appeared that if it had been entered on the morning of the 11th of June, it would have been tried. On the first day of the ensuing Michaelmas Term, the defendant obtained a rule absolute for judgment as in case of a nonsuit, which the Court refused to set aside.

Hoggins, who appeared to support the rule, was not called upon.

(*a*) 2 Dowl. 153.

(*b*) *Ante*, vol. 2, p. 604; S. C. 8 Scott, N. R. 705.

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POLLOCK, C. B.—We had occasion a few days ago to look into the form of a peremptory undertaking; and, at that time, the case of *Petrie* v. *Cullen* was referred to, and considered by the Court (*a*). On inquiry, we found that that case was decided on the special circumstances of the case, there having been an actual neglect on the part of the plaintiff to try. A plaintiff who gives a peremptory undertaking, thereby undertakes to proceed to trial according to the course and practice of the Court; how then can it be said that he neglects to do so, when he is ready to try, but is prevented from trying by the illness or act of the Judge, and the cause is in consequence made a remanet? Then it is argued, that in the present case at least, the plaintiff has been guilty of neglect; for if he had entered the cause sooner, it might have been tried. But it should be borne in mind, that the course and practice of the Court is the right of the suitor, and if by that practice a party is allowed a certain time to enter his cause for trial, he is entitled to the whole of that time. It cannot be negligence in a suitor to make use of that to which of right he is entitled, and, were we to hold otherwise, it would lead to endless inquiries. The law allows a plaintiff a certain number of days to declare, and it might as well be said that he was guilty of negligence, because he did not declare until the last of them. The circumstance of the plaintiff having obtained a special jury, seems to me to make no difference in this respect. The present rule will, therefore, be absolute to set aside the judgment which has been signed, and enlarge the peremptory undertaking until the sittings after the present Term, but without costs.

(*a*) The point came immediately before the Court on the 29th of May, in a case of *Loud* v. *Green*; and, on the 7th of June, in a case of *The Pacific Steam Navigation Company* v. *Lewis*: on both of which occasions, the Court expressed its dissent from the doctrine laid down in *Petrie* v. *Cullen*.

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ALDERSON, B.—I am of the same opinion. It is always beneficial to go back to original materials, therefore let us see what is the language of the statute upon which the practice in question is founded. The first section of the 14 Geo. 2, c. 17, enacts, that where any issue is joined in any action or suit at law, in any of his Majesty's Courts at Westminster, &c., and the plaintiff in any such action or suit "shall neglect to bring such issue on to be tried according to the course and practice of the said Courts respectively, it shall and may be lawful for the Judge or Judges of the said Courts respectively, at any time after such neglect, upon motion made in open Court (due notice having been given thereof) to give the like judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit, unless the said Judge or Judges shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issue; and if the plaintiff or plaintiffs shall neglect to try such issue within the time or times so allowed, then and in every such case, the said Judge or Judges shall proceed to give such judgment as aforesaid." How can a plaintiff be said "to neglect to try an issue," when the cause of its not being tried was the act of the Judge, over which he had no control? It is argued that a peremptory undertaking is an undertaking to try at all events; but that is a fallacy, for the rule discharging a rule for judgment as in case of a nonsuit, on the plaintiff giving a peremptory undertaking, is in fact the act of the Court, which gives the plaintiff additional time to try his cause. There is another consideration which to my mind is conclusive on the subject. In the first part of the section, the Legislature says, that if the plaintiff shall "neglect to try the issue according to the course and practice of the Court," the Court may give judgment as in case of a nonsuit. Now the established practice is, that where a plaintiff has made no default, but has taken down his cause for trial, and it is made a remanet, the defendant cannot move for judgment

as in case of a nonsuit, but his only course is to try by proviso. The reason of that is, that the plaintiff has not neglected to try according to the course and practice of the Court. Such being the construction which universal practice has put upon the word "neglect" in the first part of the section, why should we be asked to put a different interpretation upon the same word in the latter part of the section, and to say that a plaintiff who takes down a cause as required by the first branch of the section, is not responsible for delay arising from the act of others, while if he takes it down under the provisions of the second branch, he is responsible. With all respect for the learned persons who decided the case, I cannot assent to the opinions expressed in *Petrie* v. *Cullen* (*a*); though the decision in that case is not in strictness applicable, for it proceeded on the ground of positive neglect on the part of the plaintiff. I agree that the rule should be absolute, but without costs.

PLATT, B., concurred.

Rule absolute accordingly.

(*a*) *Ante*, vol. 2, p. 604.

WINWOOD *v.* HOLT. *Sc. 14 M & W. 197.*

A rule, calling on a party to pay money pursuant to an award, with a view to execution under the 1 & 2 Vict. c. 110, is a rule nisi only; and the Court refused to make such rule absolute, without personal service, where it appeared that such service might be effected.

6 Dr. & L. 681.

STREETEN moved for a rule, calling on the defendant to shew cause why he should not pay to the plaintiff certain sums of money pursuant to an award, and the Master's allocatur thereon. The object of the application was to issue execution under the 1 & 2 Vict. c. 110, s. 18, and the question was, whether the rule should be absolute in the first instance? The motion was made on affidavit verifying the award, and that the defendant had been personally served with copies of the award, Master's allocatur, and rule of Court, and that the money had been duly demanded.

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POLLOCK, C. B.—The application is in effect to turn an award into a judgment, in order that the party may issue execution. We think it ought to be a rule to shew cause only.

Rule nisi.

On a subsequent day,

Streeten moved to make the above rule absolute, upon an affidavit that the rule had been served by leaving a copy of it with the defendant's wife at his residence, and that at the same time the original was shewn to her. [*Alderson*, B.—Is not personal service indispensable?] The practice in that respect seems unsettled. In *Jordan* v. *Berwick* (*a*), *Patteson*, J., said, that as this was a new practice in lieu of attachment, he thought the service ought to be personal. But if service in that manner could not be effected, the Court, on a special statement of facts, would allow such service as might seem proper. In that case, however, it does not appear that the defendant had been personally served with a copy of the award and allocatur, and in that respect it is distinguishable from the present. On a similar application in a subsequent case of *Doe* d. *Moody* v. *Squire* (*b*), *Wightman*, J., says, "An attachment is in the nature of a penalty against a man for not obeying that which is, in effect, the order of the Court; this rule, however, is not of the same character. By this rule, it is only sought to give the award the value and effect of a judgment. It may be, that an attachment will, in future, be unnecessary for practical purposes. I think enough is done in obtaining this rule, without going through the forms which were necessary in cases of attachment." In *Wilson* v. *Foster* (*c*), the Court of Common Pleas refused to grant a rule against the defendant who was abroad, the proposed service being by leaving a copy at his last known place of

(*a*) 1 Dowl. 271, N. S.
(*b*) 2 Dowl. 327, N. S.
(*c*) *Ante*, vol. 1, p. 496; See S. C. 6 Scott, N. R. 936; 6 M. & G. 149.

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abode in England, and by sticking up another copy in the Master's office. [*Alderson*, B.—There is every reason to believe that you can serve the defendant personally, for it appears from your affidavit that you know where he resides? *Platt*, B.—How can you distinguish this rule from an attachment, and, if so, there must be personal service. In a recent case of *Hawkins* v. *Benton* (*a*), *Patteson*, J., said, that he found "that the Masters of the Courts of Common Pleas and Exchequer, have usually acted upon the rule, that in applications of this kind, the same formalities in service should in general be observed, as in the case of a motion for an attachment; but that under special circumstances, that strictness may be dispensed with."] Where there has been personal service of the award and allocatur, personal service of the rule nisi cannot be necessary.

ALDERSON, B.—You had better enlarge the rule, and serve it personally.

ROLFE, B., and PLATT, B., concurred.

Rule enlarged.

(*a*) *Ante*, vol. 2, p. 465.

LAWRENCE *v.* CLARK.

In an action on a bill of exchange to which the defendant pleaded fraud, it was held that notice to produce the bill left in the letter-box of the office of the plaintiff's attorney at half-past eight o'clock on the evening before the trial, was too late. *Held*, also, that the plaintiff was not bound to produce the bill without notice.

ASSUMPSIT by indorsee against acceptor of a bill of exchange.

Plea: that the acceptance was obtained by the fraud and covin of the drawer, and that the bill was indorsed to the plaintiff without consideration.

Replication de injuriâ.

At the trial before *Pollock*, C. B., at the Middlesex

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sittings after Hilary Term, the defendant called a witness to prove the alleged fraud, and, in order to identify the bill as the one to which the evidence related, he called upon the plaintiff to produce it. The plaintiff's counsel contended that he was not bound to produce it, unless notice had been given, and the Lord Chief Baron was of that opinion. The defendant then proved that a notice to produce the bill was put into a letter-box at the office of the plaintiff's attorney, at half-past eight o'clock on the evening before. The notice was entitled "In the Common Pleas." The Lord Chief Baron ruled that the notice was too late, and a verdict was found for the plaintiff. A rule nisi having been granted for a new trial,

Jervis and *Wordsworth* shewed cause. First, *Read* v. *Gamble* (*a*) is an express authority to shew that notice was necessary. There the notice was wrongly entitled. It will perhaps be said, that the error could not mislead; but in *Harvey* v. *Morgan* (*b*), a similar mistake was held fatal. [*Platt*, B.—There the notice was entitled in a different cause. *Alderson*, B.—The question is, whether the party has had such notice as to justify the Court in admitting secondary evidence? Suppose the names were wrongly spelled, would the notice be therefore bad? At the time *Harvey* v. *Morgan* was decided, the Courts were more strict as to these matters than they are at present.] Secondly, the notice was served too late. The attorney might not have had the bill in his possession; and in that case, time would be required in order to communicate with his client. In *Byrne* v. *Harvey* (*c*), Lord *Denman* ruled that a notice to produce in a town cause, served at half-past seven on the evening before trial, was too late. [*Pollock*, C. B., referred to *Atkins* v. *Meredith* (*d*).] *Holt* v. *Miers* (*e*) is also an authority to the same effect.

(*a*) 10 A. & E. 597, n.
(*b*) 2 Stark. N. P. 17.
(*c*) 2 M. & Rob. 89.
(*d*) 4 Dowl. 658.
(*e*) 9 C. & P. 191.

Petersdorff, in support of the rule. The notice to produce was sufficient. Though the document in question was not in issue, it might be reasonably presumed that it was in the possession of the attorney for the purpose of conducting the cause. In the cases cited, the documents required to be produced were tradesmens' books and letters, which would necessarily be in the possession of the client. [*Alderson*, B.—In *George* v. *Thompson* (*a*), the notice was to produce the agreement on which the action was brought.] In *Gibbons* v. *Powell* (*b*), a notice to produce a copy of a writ of summons, served on a clerk at the office of the defendant's attorney at eight o'clock on the evening before the trial, was held sufficient. Secondly, the plaintiff was bound to produce the bill without notice. The evidence which the defendant was about to produce was not of a secondary nature; it had no relation to the contents of the bill, but was merely a collateral fact, which was not available unless connected with the bill. [*Pollock*, C. B.—How can you prove the identity of the bill except by its contents?]

ALDERSON, B.—The rule must be discharged. In my opinion the evidence was properly excluded, on the ground that the notice to produce was served too late. In questions of this kind, each case must depend upon its particular circumstances. Here the notice was not served until half-past eight o'clock on the evening before the trial. Was it then a sufficient time to enable the plaintiff to produce the bill at ten o'clock next morning? It seems to me that it was not. I do not say that if the document had been lying before the attorney at the time, the notice might not have been sufficient; but it does not appear whether it was in the client's or the attorney's possession. As to the other point, I am clearly of opinion that the evidence was inadmissible, without a notice to produce the bill.

(*a*) 4 Dowl. 656. (*b*) 9 C. & P. 634.

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ROLFE, B.—I am of the same opinion. I should be glad if some rule had been established, that after a certain hour the notice should be deemed too late; but as that is not so, each case must depend upon its particular circumstances.

PLATT, B., concurred.

POLLOCK, C. B.—I concur in the observation that each of these cases must depend on its individual circumstances. What is sufficient in one case may not be so in another.

Rule discharged.

MEMORANDUM.

TRINITY TERM.

In this Term, in pursuance of an arrangement made by the Court in last Easter Term, certain enlarged rules were for the future to be selected, and to be taken in the Bail Court; and two, or any other small number, were to be called on each day, till the whole were disposed of.

COURT OF QUEEN'S BENCH.

Trinity Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

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The plaintiff brought his action on an agreement with the defendants to pay him a sum of 5*l.* per horse power for every steam engine they should contract to have made on his patent principle. The declaration stated that they had contracted with Messrs. F., W., & Co., for the making of a steam engine on the plaintiff's patent principle; but had refused to pay the plaintiff 5*l.* per horse power. The plea traversed in terms that the defendants had so contracted with Messrs. F., W., and Co., on which issue was joined. The Court made absolute a rule calling on the defendants to produce at the Stamp Office, for the purpose of being stamped, a letter written by Messrs. F., W., and Co., in reply to a former letter of the defendants, containing evidence of a contract for the manufacture by Messrs. F., W., and Co., of a steam engine for the defendants, on the plaintiff's patent principle.

ASSUMPSIT. The declaration recited the grant of certain letters patent to the plaintiff, for certain inventions in the manufacture of steam engines; and that after the grant of the letters, a certain company called the "British and American Steam Navigation Company," (of which the defendants were directors,) had contracted for the building a steam ship, and for the constructing and fixing a pair of steam engines in the same. It then averred an agreement between the plaintiff and the defendants that the said company should be at liberty to use the inventions of the plaintiff in the construction of the said steam engines, and of any other steam engines on board of any other vessels which they might afterwards build, on payment by the defendants of a certain sum at certain times therein specified, and on payment of 5*l.* per horse power, for each and every engine so to be constructed; "the same to be paid for on the signing of or entering into the contract or contracts for the manufacturing or purchasing of such engine or engines respectively, either in cash or in bills, at the option of the

defendants; but in case the same should be made in bills, then the same should bear interest at the rate of 5*l.* per cent. per annum, to commence and be calculated from the expiration of nine months from the date of such contract or contracts." Averment of mutual promises. Breach: that although the company, after the making of the agreement, entered into a contract with Messrs. Fawcett, Preston, and Co., for the manufacture by the said Messrs. Fawcett, Preston, and Co., of two engines of five hundred and fifty horse power, for the purpose of propelling and being used on board of a certain vessel, to wit, &c., and in which engines the principles of the inventions secured by the several letters patent were to be adopted and used by the said company: "and although the defendants thereupon, that is to say, on the entering into the said contract," became liable to pay to the plaintiff, either in money or bills, a certain large sum, to wit, &c., being after the rate of 5*l.* for each horse power in the said engines; and although a reasonable time for making such payment had elapsed; yet that they had neglected and refused to pay the same when thereunto afterwards requested. To the plaintiff's damage, &c.

The defendants pleaded inter alia, that a contract was not made and entered into by and between the said company, and the said persons using the name, style, and firm of Messrs. Fawcett, Preston and Co., for the manufacturing by the latter, of engines for the purpose of propelling and being used on board the said vessel, in the said declaration in that behalf mentioned, in which engines the principles of the inventions secured by the said letters patent were to be used and adopted by the said company: modo et formâ. Conclusion to the country. Issue thereon.

A rule had been obtained in Hilary Term last, calling on the defendants to shew cause why they should not produce a certain letter, dated the 28th of May, 1838, addressed by Messrs. Fawcett, Preston and Co., of Liverpool, in the county of Lancaster, engineers and iron

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founders, to Mr. Macgregor Laird, as secretary to the British and American Steam Navigation Company, of which company the defendants were directors, at the Stamp Office, Somerset House; for the purpose of being stamped as an agreement, at the expense of the plaintiff.

This rule was obtained on the affidavits of the plaintiff and his attorney, that the action was brought to recover compensation for license or permission granted to the defendants by the plaintiff, for using certain inventions secured to the plaintiff by certain letters patent, and which were to be used and applied by the defendants in the manufacture of certain steam engines; and which compensation, according to the terms of the contract on which the action was brought, was to be paid or secured by the defendants to the plaintiff, on the defendants entering into the contract for the manufacture of such engines, and to be calculated at the rate of 5*l.* per horse power of each engine so contracted to be manufactured. And that the present action was brought to recover the said sum of 5*l.* per horse power on certain engines contracted to be manufactured with plaintiff's patent inventions by the defendants, with Messrs. Fawcett, Preston and Co., of Liverpool; and which contract, as the plaintiff was informed and believed, is contained in two letters, one addressed by the said Messrs. Fawcett, Preston and Co., to Mr. Macgregor Laird, then acting on behalf of the defendants, and then being secretary to the British and American Steam Navigation Company, of which defendants were directors, and which letter was dated the 28th of May, 1838; and the other addressed by the said Macgregor Laird, to the said Messrs. Fawcett, Preston and Co., in reply to the former letter, and dated the 29th day of May, 1838. And that in order to establish plaintiff's case, it was necessary for him to produce at the trial one or both of the said letters duly stamped. That the first mentioned letter, as the plaintiff is informed and believes, is in the custody, possession, or power of the defendants, or of the said Macgregor Laird, formerly the

secretary, and afterwards a director of the said British and American Steam Navigation Company; and that the said second mentioned letter was in the possession of Messrs. Fawcett, Preston and Co., who have refused to produce the same to be stamped. That a correspondence had taken place between the attorneys of the plaintiff and of the defendants, which had resulted in the defendants' attorney denying that the letter of the 28th of May, 1838, was in their possession, or, as they believed, in that of their clients, and refusing to admit any copy of such letters in evidence at the trial.

In opposition to the present rule, an affidavit was made by the managing partner of the defendants' attornies, who had the conduct of the defence, "that he has not, nor ever had, possession of the letter bearing date the 28th day of May, 1838, mentioned in the plaintiff's affidavit; neither is such letter, to the knowledge and belief of deponent, in the possession of the defendants, or either of them." There was, however, no affidavit by the defendants themselves, nor any statement of any search having been made, or endeavour to find the letter in question.

Martin now shewed cause. It must be admitted, that on the present affidavits, the case must be argued as if the letter in question were in the possession of the defendants. It is submitted that the plaintiff has no right to require the defendants to produce this letter for the purpose of being stamped. The rule is, that where the plaintiff is a party to the document, or has an interest in its being enforced, the defendant may be taken to hold as a trustee for him, and therefore will be compelled to produce the instrument to be stamped. But where a document exists in a defendant's possession, to which the plaintiff is neither a party, nor under it takes any immediate interest, such document must be considered, if material to the cause, as a part of the defendant's evidence, and which he is not bound to produce to make good the plaintiff's case. Thus in

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Lawrence v. *Hooker* (*a*), which case is a strong authority against the present rule, the Court of Common Pleas refused to compel a defendant to produce, for the purpose of being stamped, an agreement between himself and a third person; although it appeared by an affidavit of the third person, that the act complained of by the plaintiff arose out of that agreement. And it is laid down in 2 *Chit. Archb. Pr.* p. 1025, 6, 7*th ed.*, that a Judge will not order the production, "where the instrument is between parties and persons not parties to the action, and where it might interfere with their rights or liabilities." The Court could have no such power as it is now asked to exercise before the statutes requiring stamps to be affixed; and the statutes confer no new power in this respect. It is clear that the Court could not order the defendants to produce this letter in evidence; and, if so, it is difficult to see on what ground they can order it to be produced, in order to be stamped. There is, indeed, a case of *Neale* v. *Swind* (*b*), which would seem to be in favour of the present motion. There it was held, that where one part of a document had been lost, the party holding the other part might be compelled to produce it for the purpose of being stamped, though not held on any trust for the party applying. But that case is distinguishable; for there the party on whose motion the deed was to be produced was a party to it, and must therefore have had a direct interest in it. In *Bateman* v. *Phillips* (*c*), where the defendant had given a guarantee for the payment of the notes of a bank, which it was sought to compel him to produce, in order to be stamped, the contract, if at all, was made with all the parties holding notes of the bank, and the plaintiffs were therefore parties in interest. In *Taylor* v. *Osborne* (*d*), which was decided in the same Court, and which was cited in the foregoing case, but is not elsewhere reported, the

(*a*) 2 M. & P. 9; S. C. 5 Bing. 6.
(*b*) 2 Cr. & J. 278; See S. C. 2 Tyr. 318; 1 Dowl. 314.
(*c*) 4 Taunt. 157.
(*d*) Id. p. 159.

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plaintiffs having brought an action against the defendant as the survivor of three partners, and having been nonsuited at the trial by the production of the unstamped deed of partnership, afterwards brought a fresh action, and moved for a rule similar to the present, which was, however, refused by the Court. The principle, therefore, upon which the cases seem to have been decided is, that the party seeking to enforce the production of the instrument must shew that he is a party to it, or takes a direct interest in its enforcement or breach. This is not done in the present case; and it is therefore submitted, that unless the Court is prepared to go further than in the preceding cases, this rule must be discharged.

Cowling, in support of the rule. It may be true that the Court had no power before the Stamp Acts to grant a rule, the necessity for which only arose from the provisions of those statutes, and that there is no express clause in that statute authorizing them to do so; but this argument, if valid, would prove that in every case in which the Court has granted a similar rule to the one now prayed for, it has exceeded its authority. It is apprehended, however, that the Court has a power of its own inherent jurisdiction to grant such motions, the only object of which is to prevent the party applying from suffering from the negligence or misconduct of a third party, who by a disobedience of the Stamp Laws, may prevent him from giving a document necessary to his case in evidence at the trial. This is not the case of an application for an inspection of a document. It can do the defendants no damage to have the letter in question stamped at the plaintiff's expense. It will not facilitate the plaintiff's proof of the letter at the trial; it will only prevent his being precluded from using it in evidence, if the defendants when called upon, produce it at the trial; and enable him, in the event of their refusing to do so, to give secondary evidence of its contents. The cases which have been decided do not establish the

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restriction of the rule which it is said exists. In *Neale* v. *Swind* (*a*), it was objected that the party held the deed under no trust for the party applying; yet the Court decided that it should be produced to be stamped, because they would not permit that the plaintiff should be defeated, in the event of its being produced under a notice to that effect at the trial. That case is a direct authority for the present motion. In *Bateman* v. *Phillips* (*b*), the question was fully argued, and the Court was clearly of opinion that it had the power to grant such a rule. The case of *Taylor* v. *Osborne* (*c*) is no where reported except in the argument in the foregoing case, and may have been decided partly on the ground that the plaintiffs were no parties to the deed, and partly on the ground that they took no interest in the terms of it; and that the cause of action did not depend on it, as in the present case. The case of *Lawrence* v. *Hooker* (*d*), which has been relied on by the other side, is distinguishable; for there the plaintiff had no interest in the agreement, and the rights of the third party might have been prejudiced, for the agreement might have been illegal. That case may, therefore, be taken to have been decided on one of those two grounds; and, indeed, it is taken as decided upon the latter, in 2 *Chit. Archb. Pr. p.* 1025, 6, 7*th ed.*, where it is cited as an authority for the passage which has been quoted from that work. Here, however, the plaintiff has a decided interest in the agreement in question. His cause of action is the non-payment of 5*l.* per horse power on a contract for the manufacture of a steam engine made by the defendants with Messrs. Fawcett, Preston and Co., and the defendants have taken a direct issue that they made no such contract. The defendants may in truth be said to hold the letter as trustees for the plaintiff, using that word in a loose sense; for the plaintiff must have a right to see the contracts which the defendants

(*a*) 2 Cr. & J. 278; See S. C. 2 Tyr. 318; 1 Dowl. 314.

(*b*) 4 Taunt. 157.

(*c*) 4 Taunt. 159.

(*d*) 2 M. & P. 9; S. C. 5 Bing. 6.

make, or how else can he ascertain to what amount he is entitled upon them? However, it is not necessary to argue this point. The authorities do not bind us to shew that the defendants hold the document as trustees. It is sufficient that the plaintiff has a manifest and visible interest in the document; that a direct issue has been tendered and accepted as to its existence, and that the plaintiff must give a notice to produce it at the trial before he can be permitted to give evidence of its contents, and that if it be produced and be unstamped, he will be nonsuited.

WIGHTMAN, J.—I am of opinion that this rule must be made absolute. The defendants are in possession of a letter to which they are parties, and which is said to be evidence of an agreement between them and other persons; and which letter, if properly stamped, must, for the purposes of the present motion, be assumed to be material evidence under the issue which has been taken between the parties in the present cause. It is not proposed to inspect or to take a copy of this document, but merely that the defendants should produce it at the Stamp Office, in order that it may be stamped; and I think, that for the purpose of the present motion, the plaintiff may be taken to have a sufficient interest in it, although he may have none in the subject-matter of the document. In the case of *Lawrence* v. *Hooker* (*a*), which has been relied on by the defendants, it would seem that the decision there proceeded on the ground that it might interfere with the interests and rights of third parties, which might be injuriously affected by granting the application, and that, therefore, the application ought to be to the Court of Chancery. It would be difficult to see in the present case how any injury could arise to Messrs. Fawcett and Preston from this rule being granted. This application to produce a document for the purpose of

(*a*) 2 M. & P. 9; S. C. 5 Bing. 6.

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being stamped, stands on a very different ground from an application to inspect and take a copy; and this distinction is adverted to in *Neale* v. *Swind* (*a*), which was decided subsequent to the case of *Lawrence* v. *Hooker*, and the decision in which, I think, proceeded on sound principles. The rule will therefore be absolute.

Rule absolute.

(*a*) 2 C. & J. 278; See S. C. 2 Tyr. 318; 1 Dowl. 314.

MURRAY *v.* The QUEEN.

The Court dispensed with the attendance of the plaintiff in error to crave oyer of the record of an indictment for bigamy, for the purpose of assigning errors: where it appeared that he was resident in Australia, where he had been for the last thirty years; that he was sixty-six years of age, and subject to paralytic attacks; and that he could not make the journey to this country without injury to his health, and without considerable pecuniary loss.

Where the prosecutor and his attorney were both dead, the Court directed service of the rule to join in error to be made, by sticking it up in the Crown Office, and serving a copy on the solicitor to the Treasury.

WHITE applied for leave in this case to dispense with the attendance of the plaintiff in error in person, to crave oyer of an indictment on which he had been found guilty, and to assign errors on the record, under the following circumstances. The plaintiff in error had been found guilty of the offence of bigamy at the Middlesex January Sessions, 1815, and had been sentenced to transportation for seven years. The first marriage was a Presbyterian marriage in Ireland, and such a marriage, according to the case of *Regina* v. *Millis* (*a*) since decided, was not valid; and the plaintiff had, therefore, not been legally guilty of bigamy. He had undergone that sentence, and was now resident in Australia, where he was conducting a local newspaper as editor. The affidavit in support of the motion stated that he was now sixty-six years of age, and subject to fits of paralysis; that he had resided in Australia ever since he left this country; and that the journey to this country would be attended with injury to his health, as well as with great pecuniary loss. The assignment of errors had been

(*a*) 10 Cl. & Fin. 534.

drawn up and signed by counsel; but the practice was, in cases of felony, to require that the defendant himself should appear in Court to crave oyer of the record, and to assign errors in person. Under the above circumstances the Court perhaps would dispense with his attendance.

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The Court, after consulting with the Master, granted the motion.

Motion granted (*a*).

On a subsequent day,

White moved (*b*), on an affidavit, that both the prosecutor and his attorney were dead; that service of the rule to join in error, by sticking it up in the Crown Office, and serving it on the solicitor to the Treasury, should be deemed a sufficient service.

PER CURIAM.

Motion granted.

(*a*) In the full Court, in Easter Term.

(*b*) In the Bail Court, before Mr. Justice *Coleridge*, in the same Term.

REX *v.* The Justices of LINDSEY.

A RULE had been obtained, calling on the justices of Lindsey, to shew cause why a writ of certiorari should not issue to remove into this Court an order of Quarter Sessions, made on an appeal against an assessment made by the Commissioners of the Fen Courts, under the statute 6 & 7

A local act, the 6 & 7 Vict. c. 76, empowered certain commissioners to make an assessment for the purposes mentioned in the act. The act contained several clauses relating to proceedings before magistrates to enforce the payment of the assessment; and, by a subsequent clause, the 158th, provided "that no proceeding in pursuance of this act, &c. shall be quashed or vacated for want of form, nor shall the same be removed by certiorari or otherwise, into any of the superior Courts." The power to appeal to the quarter sessions was given by the 161st section: *Held*, that the clause taking away the certiorari had a general application to all proceedings under the act; and, therefore, applied to the case of an appeal under the 161st section:

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Vict. c. 76, (local and personal public) entitled "An Act for draining, embanking, and improving the fen lands and low grounds within the parishes, hamlets, townships, or places of Bardney, Southron otherwise Southry, Tupholme, Buchnall, Horsington, Stixwould, Edlington, and Thimbleby, in the county of Lincoln." The order of Quarter Sessions had been made, subject to a special case for the opinion of this Court; and it was to bring up the special case accordingly, that this rule was obtained. The act contained several clauses authorising proceedings to be taken by the commissioners before magistrates, for the purpose of enforcing payment of the assessment; and then, by the 158th section, enacted, "that no proceeding in pursuance of this act shall be quashed or vacated for want of form, nor shall the same be removed, by certiorari or otherwise, into any of the superior Courts." By a subsequent section, the 161st, the right of appeal to the Quarter Sessions is given: "And be it enacted, that if any person shall think himself aggrieved by the rating or taxing of the said fen lands or low grounds, or by any other act of the said commissioners, or by any determination or adjudication of any justice under the provisions of this act, he may appeal to the general Quarter Sessions for the parts of Lindsey in the said county of Lincoln," &c.

Wildman shewed cause, and took a preliminary objection that by the 158th section of the act, the writ of certiorari was expressly taken away. And the only question was, whether the order of Quarter Sessions on appeal, was a "proceeding in pursuance of the act," which it was submitted it clearly was.

The Court called upon

Willmore to support the rule. The writ of certiorari can only be taken away by express words (*a*). The 158th

(*a*) See *Rex* v. *Reeve*, 1 W. Bl. 231; See S. C. 2 Burr. 1040.

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section enacts, that "no proceeding in pursuance of this act" shall be removed by certiorari. The term "proceeding" does not fairly comprehend an adjudication by a Court of Quarter Sessions on appeal. Where the Legislature intend the enactments of a statute to apply to it, they expressly mention it in terms. Thus in the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, the words are, "no proceeding or adjudication of the sessions thereon;" which shews that the word "proceeding," does not, ex vi termini, include an order on appeal of a Court of Quarter Sessions. At any rate, it is at least a matter of doubt whether in the present instance it does; and being so, it is important to remark the collocation of the clauses, as indicating the intention of the Legislature. Here all the previous clauses to the 158th, relate only to proceedings before the magistrates, and the right to appeal is given by a subsequent clause. The ordinary rules of construction, therefore, would seem to limit the word "proceeding," to such proceedings as had been before authorised, and not to a power of appeal given by a subsequent section. On reference to the statute book, it will be found that wherever the right to the certiorari is taken away, it is taken away by the same section which gives the power of appeal, or in the one immediately following. Thus in the Small Tithes Act, 7 & 8 Wm. 3, c. 6, the writ of certiorari is taken away by the same clause, which confers the right to appeal. In that act also, the words used are "proceedings or judgment." Various other instances might be adduced from the statute books. [*Wightman*, J.—Suppose the 158th section had come after the one which gives the right to appeal, or had been the very first in the act, would that have made any difference in the construction to be put upon the term "proceeding."] That would no doubt have strengthened the view contended for by the other side. But as that is not so here, and there is a doubt as to the meaning of the word "proceeding," it is submitted that the certiorari is not taken away.

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WIGHTMAN, J.—I will hear Mr. *Wildman* against the rule generally, if I find it necessary.

Cur. adv. vult.

WIGHTMAN, J., on a subsequent day delivered judgment. The only question in this case was, whether the proceedings upon an appeal to the Quarter Sessions under a local act of the 6 & 7 Vict. c. 76, were removable into this Court by certiorari; or whether by the 158th clause of this act, the certiorari were not taken away.

By that clause it was enacted, that no proceeding in pursuance of that act should be quashed or vacated for want of form, nor should the same be removed by certiorari or otherwise into any of the superior Courts. This clause came after several clauses relating to proceedings and convictions before magistrates, and before the clause giving an appeal to the Quarter Sessions to persons aggrieved by any adjudication of the justices, or proceedings of certain commissioners; and it was contended, that the clause taking away the certiorari, applied only to the proceedings before justices mentioned in the previous clauses, and not to the proceedings upon appeals to the Quarter Sessions, which were mentioned in a subsequent clause.

But I am of opinion, that the clause taking away the certiorari, has a general application to all proceedings under the act. The words in their ordinary sense would include them all; and if they did not, this anomaly would follow: that if unappealed against, no proceedings before justices could be removed; but when appealed against, they might in effect, and indirectly be removed; which the Legislature could hardly have intended. The rule for the certiorari must, therefore, be discharged.

Rule discharged.

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MILES *v.* BOUGH.

Where there were issues of fact and of law, and after verdict for the plaintiff on the former, and a rule for a new trial, which was discharged, the plaintiff, in the same Term in which the rule was discharged, set down the demurrer in the special paper, but died before it came on for argument: judgment having been subsequently given for him on the demurrer, the Court made absolute a rule to enter up judgment as of the Term in which the demurrer was set down for argument.

DEBT by the plaintiff as treasurer of certain trustees appointed under an act of Parliament for building a bridge over the river Avon, at Clifton (*a*). Several pleas were pleaded, to some of which the plaintiff demurred, and issues of fact were raised on the others. The latter issues were tried at Bristol, at the Summer Assizes in 1841, when the plaintiff obtained a verdict. A rule nisi for a new trial was subsequently obtained, and having been made absolute in Michaelmas Term 1842, the cause was again tried, and a verdict again obtained by the plaintiff, at the Summer Assizes in 1843; and a rule for a new trial having been again granted, it was discharged on the 22nd of May, 1844 (*b*). In Trinity Term, 1844, the demurrer was set down for argument, but was not reached until the 2nd of May, 1845, when it was called on, and judgment was given for the plaintiff on the pleas demurred to, no counsel appearing to support them. In the mean time, in March, 1845, the plaintiff had died, and a difficulty having arisen as to entering up judgment, *Butt* obtained a rule to show cause why judgment as of Trinity Term, 1844, should not be entered nunc pro tunc; against which

Crowder now shewed cause. The 17 Car. 2, c. 8, s. 1, provides that the death of either party to an action, between the verdict and the judgment, shall not be alleged for error, so as such judgment be entered within two Terms after such verdict; but that statute is applicable only where the cause is decided by the verdict, and nothing more remains to be done but to sign judgment. Nor does Reg. Gen., H. T., 4 Wm. 4, r. 3 (*c*), affect the question, as that rule

9. 2/3. 48.

(*a*) 11 Geo. 4, and 1 Wm. 4, c. lxix. local and personal, public.

(*b*) See the case reported, 4 Q. B. 845.

(*c*) All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in Term or Vacation, when signed, and shall not have relation to

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gives no new power to the Court, but only enables them to apply their previous powers to the new system of entering up judgments of the day on which they are actually signed. No case can be found in which judgment has been allowed to be entered nunc pro tunc, where issues in law remained undecided at the death of either of the parties. In *Blewett* v. *Tregonning* (*a*), the action had been decided by the verdict, and the delay beyond the two Terms in signing judgment, was created by a difficulty in the taxation of costs. The same was the case in *Evans* v. *Rees* (*b*).

Butt, in support of the rule. Judgment ought in this case to be entered up from the date of setting down the demurrer for argument. The delay was caused by the pressure of business in the Court, and where that is the case, the Court has power to direct judgment to be entered nunc pro tunc, and this quite independently of the statute of Charles. The distinction is between delay arising from the act of the Court, and that caused by the laches of the party; 1 *Arch. Pr.* 338, 7th ed. This principle has been distinctly recognised in several cases, *Lanman* v. *Lord Audley* (*c*), *Bridges* v. *Smyth* (*d*), *Key* v. *Goodwin* (*e*), *Copley* v. *Day* (*f*), where the delay was entirely by the laches of the party, nothing remaining to be done after verdict. In *Doe d. Taylor* v. *Crisp* (*g*), where a verdict was taken subject to a special case, and before the case was set down for argument, the party died; the Court held that the long delay in setting down the case was laches in the party, and on that ground refused to allow judgment to be entered nunc pro tunc. The decision in *Lawrence* v. *Hodgson* (*h*), was to the same effect. In *Green* v. *Cobden* (*i*), where delay had arisen

any other day: provided that it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc."

(*a*) 4 A. & E. 1002.

(*b*) 12 A. & E. 167; S. C. 4 P. & D. 36.

(*c*) 2 M. & W. 535; S. C. 5 Dowl. 596.

(*d*) 1 M. & Sc. 93; See S. C. 8 Bing. 29; 1 Dowl. 242.

(*e*) 1 M. & Sc. 620.

(*f*) 4 Taunt. 702.

(*g*) 7 Dowl. 584.

(*h*) 1 Y. & J. 368.

(*i*) 4 Scott, 486.

from a special case waiting for argument, and the plaintiff died before it was argued, but more than two Terms were suffered to elapse after the final decision; judgment was allowed to be entered up nunc pro tunc, on the ground that the plaintiff having been at one time entitled to judgment, there was nothing in the circumstances of the case to authorize the Court to take away that right, the statute of Charles not being applicable, and the avowant not showing that he was prejudiced by the delay. It is, therefore, a question for the discretion of the Court, depending on the circumstances of the case, and in the present case it is not suggested that any injury can arise to the defendants, nor has there been any laches on the part of the plaintiff. All the authorities on the subject are collected in *Evans* v. *Rees* (*a*).

Cur. adv. vult.

WIGHTMAN, J., afterwards (*b*) delivered the judgment of the Court.—This was an application to be at liberty to enter up a judgment nunc pro tunc.

The plaintiff was sued as treasurer of certain trustees under an act of Parliament for building a bridge over the river Avon. The action was for calls, and was in debt.

There were several issues of fact and of law. The issues of fact were tried in August, 1843, and a verdict was found for the plaintiff. A rule nisi for a new trial, or to arrest the judgment was granted in Michaelmas Term, 1843, and on the 22nd of May, 1844, being the first day of Trinity Term, that rule came on for argument, and was discharged.

The plaintiff immediately, in that same Trinity Term, set down the issues in law for argument, and they continued in the special paper, without being reached, until the 2nd of May, 1845, when they came on for argument in due course, and judgment was given for the plaintiff.

The plaintiff died in the month of March, 1845, upwards

(*a*) 12 A. & E. 167.
(*b*) In the Vacation after Michaelmas Term.

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of nine months after the case had been set down in the special paper for argument, and nearly two months before it actua llycame on for argument.

It was contended for the defendant, that the only cases in which judgment was allowed to be entered nunc pro tunc, were those in which nothing remained to be done at the time of the death of the party, but to pronounce the judgment; the case having been heard, and the Court, instead of giving judgment immediately, taking time for its own convenience, and the death intervening before judgment actually pronounced.

Upon examination, however, of the cases which are reported upon this point, it appears to me that the practice is far more liberal and extended; and that in such cases as the present, the Court has allowed the judgment to be entered nunc pro tunc, unless the delay was occasioned by the laches of the plaintiff, or those representing him, or some prejudice would arise to the other party, to which he would not otherwise be subject.

In the present case there is no laches imputable to the plaintiff, or those who represented him, nor does the entry of the judgment nunc pro tunc create any hardship upon the defendant.

The cases of *Lawrence* v. *Hodgson* (*a*), (in which all the older authorities are cited) and *Bridges* v. *Smyth* (*b*), appear to me to support the proposition that wherever, in such cases as the present, the delay is that of the Court, and not that of the parties, the judgment may be entered nunc pro tunc. The case of *Bridges* v. *Smyth*, is strongly in point with the present, the judgment was not signed for more than two Terms after the verdict, and after the death; but Lord Chief Justice *Tindal* says, "The statute 17 Charles 2, does not apply to such a case as this, but depends upon a rule of the common law, that where parties are delayed by act of law, neither of them loses his right,

(*a*) 1 Y. & J. 308. (*b*) 8 Bing. 29.

but eventually judgment is entered nunc pro tunc, as if the party were still alive."

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In that case as in this, the parties were delayed by a rule to reduce the damages, which did not come on for argument till more than two Terms had elapsed from the period, not only of the verdict, but of the death of the plaintiff.

If it could be shewn that the defendant, or any third persons would be prejudiced, the Court might refuse to interfere; but in the absence of any well founded objection of that sort, it appears to me that the rule for entering the judgment nunc pro tunc should be made absolute.

Rule absolute.

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PASHLEY had obtained a rule, calling upon the justices of Middlesex to shew cause why a mandamus should not issue, commanding them to enter continuances and hear an appeal against a rate for the relief of the poor of the parish of St. Leonard, Shoreditch, in the said county. By the 121st section of the 53 Geo. 3, c. cxii., (local and personal, public) an appeal against the determination of the trustees, appointed to carry out the several purposes of this act, is given to the party grieved to the next Middlesex Sessions, the appellant giving "seven days' notice at least" to the clerk of the trustees of his intention to bring such appeal. One Henry Thomas, having been rated under the act, applied for relief to the trustees, who decided against him, their determination being come to on the 26th of September, and confirmed in pursuance of the act on the 16th of October. On the 31st of December, at half-past nine o'clock A.M., he served a notice

A local act required seven days' notice "at least" to be given by an appellant of his intention to bring an appeal. Notice was served on the 31st of December. The sessions commenced on the 7th of January, on which day appeals were entered, but not heard till a subsequent day: *Held*, first, that the notice was insufficient, as both the day of giving the notice, and the day of holding the sessions, must be excluded; and that the day of bringing an appeal is the day on which it is entered, not that on which it is heard: secondly, that the fraction of a day cannot be taken into consideration in such a case.

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of appeal on the clerk of the trustees, for the next sessions, which commenced at ten o'clock A.M. on the 7th of January following. By the rule of the sessions all appeals intended to be tried must be entered on that day, though the hearing of them was adjourned to the 30th of January. The appeal was further adjourned to the April sessions, on the application of the respondents; and on its coming on for trial at those sessions, they objected that the notice was insufficient, as not having been given seven clear days before the January sessions. The sessions were of that opinion, and dismissed the appeal, no objection being then taken by the appellant that there had been any waiver on the part of the respondents. The present rule was granted on two grounds; first, that the day on which the notice was given ought to be included in the computation of the time; or that, at all events, if the fractions of the days were considered, seven clear days had elapsed between the notice and the commencement of the sessions: secondly, that the respondents had waived the objection to the notice by applying for the adjournment of the appeal.

Prendergast and *Hodges* shewed cause. The words of the statute "seven days at least" must mean that seven whole days must intervene between the day of giving the notice and the day of entering the appeal. The meaning of the words "at least" has been decided in a number of cases; *Regina* v. *The Justices of Shropshire* (*a*), *Zouch* v. *Empsey* (*b*), *Mitchell* v. *Foster* (*c*), *Chambers* v. *Smith* (*d*). Then as to taking the fraction of a day into consideration, *Godson* v. *Sanctuary* (*e*), will be relied on, but the circumstances of that case render it inapplicable to the present question. [*Wightman*, J.—There the question was as to the priority in time of one of two acts, both done on the

(*a*) 8 A. & E. 173; See S. C. 3 N. & P. 286.
(*b*) 4 B. & A. 522.
(*c*) 12 A. & E. 472; See S. C. 4 P. & D. 105; 5 Dowl. 527.
(*d*) 12 M. & W. 2; See S. C. 2 Dowl. 1057, N. S.
(*e*) 4 B. & Ad. 255; See S. C. 1 N. & M. 52.

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same day, and it became material to consider the fraction of a day.] It appears, that appeals are not tried on the first day of the Middlesex Sessions. The law, however, takes no notice of adjournments, but contemplates the sessions as one day; the notice, therefore, must be given for the first day; *Rex* v. *The Justices of Surrey* (*a*). [*Wightman*, J.— I think the day on which the appeal is entered, must for this purpose be considered as the day on which it is brought.] As to the waiver, the point was not raised at the sessions, and if it had been, the justices would not have been bound by it. They cited *Rex* v. *The Justices of the West Riding of Yorkshire* (*b*), *Regina* v. *The Justices of Middlesex* (*c*). [It was also contended that the sessions had no jurisdiction, as the application for relief was not made to the trustees in proper time; but that point was not referred to in the judgment.]

Pashley, in support of the rule. The notice was in time. In *Legge* v. *Williams* (*d*), it was held, that under the 14 Geo. 2, c. 17, s. 4, which required notice to be given "at least ten days" before a trial, a notice on the 9th for the 19th was sufficient. That case was not cited in *Zouch* v. *Empsey* (*e*). In *Regina* v. *The Justices of Shropshire* (*f*), the notice was required to be given "fourteen days at least before the first day of the sessions." That case is, therefore, distinguishable; as the terminus ad quem was there distinctly pointed out, and expressly excluded. He cited also *Rex* v. *Goodenough* (*g*), *Rex* v. *The Justices of the West Riding of Yorkshire* (*h*), *Gould* v. *Hole* (*i*). But the Court will notice the fraction of a day, and if so it is clear that more than seven days, that is more than seven

(*a*) 1 M. & S. 479.
(*b*) 5 B. & Ad. 667; See S. C. 2 N. & M. 390.
(*c*) 2 Dowl. 719, N. S.
(*d*) Cited in 2 *Tidd's Pract.* 755, 9th ed.
(*e*) 4 B. & A. 522.
(*f*) 8 A. & E. 173.
(*g*) 2 A. & E. 463.
(*h*) 4 B. & Ad. 685; See S. C. 1 N. & M. 426.
(*i*) 4 M. & R. 201, n.

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times twenty-four hours, intervened between the notice and the beginning of the sessions in this case; *Symons* v. *Low* (*a*), *Pugh* v. *Robinson* (*b*), *Ex parte Farquhar* (*c*), *Ex parte Davey* (*d*), *Ex parte Senior* (*e*), *Godson* v. *Sanctuary* (*f*). In *Harper* v. *Taswell* (*g*), *Tindal*, C. J., says, The statute requires that he shall wait five whole days, "that is five times twenty-four hours." *Cowie* v. *Harris* (*h*) is to the same effect. The rule is, that where the time is to be computed from the doing of an act, the day on which it is done is included; otherwise, where the time is to be reckoned from a given day; *Bellasis* v. *Hester* (*i*), citing *Clayton's case* (*k*), *Co. Litt.* 46, *b.*, 255, *a.*, *Com. Dig.*, "*Temps*," (A.), *Norris* v. *The Hundred of Gawtry* (*l*), *Glassington* v. *Rawlins* (*m*), *Hardy* v. *Ryle* (*n*), in which case *Bayley*, J., distinguishes between those who are privies to an act and strangers. He also contended, that the words "at least," had not the strict meaning attributed to them, but were necessary to be used to preclude the argument that exactly seven days' notice was required.

Cur. adv. vult.

WIGHTMAN, J.—This was a rule for a mandamus to the justices to enter continuances and hear the appeal of one Henry Thomas against a poor-rate for the parish of St. Leonard, Shoreditch. The proceedings were under a local act, 53 Geo. 3, c. cxii., regulating the parish. The act authorizes a party aggrieved to apply for relief to the trustees, and, if dissatisfied with their determination, to appeal to a Quarter Sessions to be holden within three months next after such determination. In case of such appeal, the

(*a*) Styles, 72.
(*b*) 1 T. R. 116.
(*c*) Mont. & Macarthur, 7.
(*d*) 4 D. & R. 646.
(*e*) 1 Dowl. 517.
(*f*) 4 B. & Ad. 255.
(*g*) 6 C. & P. 166.
(*h*) Moo. & M. 141.
(*i*) 1 Ld. Raym. 280.
(*k*) 5 Rep. 1, a.
(*l*) Hob. 139.
(*m*) 3 East, 407; See S. C. 4 Esp. 224.
(*n*) 9 B. & C. 603; See S. C. 4 M. & R. 295.

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appellant is required to give "seven days' notice at least," in writing, of his intention to bring such appeal. The first day of the sessions at which the appeal was entered was the 7th of January, and the notice was served at half-past nine in the forenoon of the previous 31st of December. The question was, whether the day of the service could be included in the computation of the seven days, or whether the seven days were to be exclusive of the day on which the notice was given, as well as of the day on which the sessions were held.

If this question were to be considered now for the first time, I should be disposed to doubt whether by the words, "seven days' notice at least," more was meant than that seven days should be the shortest notice, but that more might be given if the party pleased; but it has been so frequently decided that the words "at least" have the effect of excluding the day of the notice, as well as the day of the act of which notice is given, that it seems to me too late now to raise the question, and that we must abide by what has been so frequently decided. The cases of *Zouch* v. *Empsey* (*a*), *The Queen* v. *The Justices of Shropshire* (*b*), and *Mitchell* v. *Foster* (*c*), are direct authorities that the words "at least" have the effect of excluding the day of the notice, and the day of the act to be done; and in the two latter cases the Court, without approving the former decisions, consider they are bound by them, and that the point may be considered settled.

It was contended that the fraction of a day might be considered, and that the notice might be calculated from the hour of the day on which it was served; but there is no authority for such a proposition as applicable to cases like the present. In all such cases the general rule excluding fractions of a day from the computation of time has been applied, and great inconvenience might follow if it were not so. Where the question is, which of two acts, or conflicting

(*a*) 4 B. & A. 522.
(*b*) 8 A. & E. 173.
(*c*) 12 A. & E. 472; See S. C. 4 P. & D. 150.

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rights, shall take precedence of the other, the precise time, including fractions of a day, must necessarily be inquired into; but such cases are not applicable to the present, which must be governed by the general rule.

I am, therefore, of opinion that the notice was served one day too late, and consequently that the sessions were warranted in refusing to hear the appeal.

There were other points made upon the argument to which it is unnecessary now to advert; for some of them were disposed of at the time, and the consideration of the others is rendered unnecessary by the opinion I have formed as to the sufficiency of the notice.

Rule discharged.

Ex parte GALE.

Upon habeas corpus to discharge a prisoner out of custody who has been committed by virtue of an order of magistrates, under the 8 Vict. c. 8, s. 25, (the Mutiny Act) for assisting to conceal a deserter; notice of the rule should be served upon the secretary at war.

A HABEAS corpus having been obtained, directed to the gaoler of Durham gaol, to bring up the body of one Matthew Gale, the younger, committed to his custody on a conviction under the Mutiny Act, 8 Vict. c. 8, s. 25, for assisting to conceal a deserter, on the ground that the warrant was bad for defects on the face of it (*a*);

Bramwell now moved that the prisoner be discharged out of custody.

WIGHTMAN, J.—Ought not the crown to have notice of this motion? Have you given any notice to the secretary at war?

Bramwell. Notice has not been given to the secretary at war; but it has been given to the informer, and to the committing magistrates, who do not appear to oppose his discharge. It is submitted that the crown has no interest in this party's being detained, more than in any other

(*a*) The warrant set out an adjudication of two magistrates, that the party should "forfeit the sum of 20*l.*, or three months' imprisonment," without stating that there were not sufficient goods whereon the penalty could be recovered, pursuant to sec. 77. There were several other defects.

criminal case, in which it is never usual to consider the crown for this purpose as an interested party.

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WIGHTMAN, J.—This concerns the public service, being the case of a person who has assisted a deserter from her Majesty's service. It is always usual in the case of smugglers to give notice to the board of customs. Besides, by the 78th section of the Mutiny Act, one moiety of the penalty is to be paid to "the general agent for the recruiting service in London, to be at the disposal of the secretary at war." I think, in the present instance, you had better give notice to the secretary at war.

On a subsequent day,

Bramwell produced an affidavit of notice having been given, and on the return being read, and the defects pointed out, and no cause being shewn, the Court ordered the prisoner to be discharged.

Prisoner discharged.

TAYLOR *v.* HODGSON.

Where an attorney encloses an unsigned bill of costs in a letter signed by him, and the bill of costs does not on the face of it shew who is the party chargeable therewith, the letter may be referred to to supply that defect.

THIS was an action of debt for work and labour as an attorney and as the defendant's agent, and for money paid, and on an account stated. The defendant pleaded the general issue, and that no signed bill had been delivered in pursuance of the statute 6 & 7 Vict. c. 73 (*a*). The plaintiff joined issue on the first plea; and replied to the second plea, that he did, above one calendar month before the commencement of the action, to wit, on, &c., send by the post to the defendant, to wit, at his office of business, a bill of the said fees, charges, and disbursements in the said plea mentioned, and which said bill was then accompanied by a letter subscribed with the proper hand of the

6-C13-522.
16. 213-507.

(*a*) It would seem that the plaintiff was not bound to deliver a signed bill, this being for agency business; See *In re Gedye*, *ante*, vol. 2, p. 915.

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plaintiff referring to such bill, as was and is required by the statute. The defendant joined issue on this replication.

At the trial which took place on the 4th of March, in the present year, before the sheriff of Middlesex, it appeared, that the plaintiff was an attorney in London, and the defendant a country attorney, and that the action was brought by the plaintiff as the London agent of the country attorney, for certain costs incurred in an insolvent's estate of the name of Hiles. The plaintiff, it appeared, had enclosed a bill of costs, headed "assignees' costs, not taxed up to filing the last account," in a letter of which the following is a copy, and sent it to the defendant by the post.

"RE HILES.

"Dear Sir,

I herewith beg to send you the bill of costs herein, and shall be obliged by your sending me a cheque for 20*l.*, which will be about my charges in the most troublesome and disagreeable business I ever had, &c."

"Yours truly,
George H. TAYLOR.
23, Lincoln's Inn Fields,
15th October, 1844."

"T. R. HODGSON, Esq., Solicitor,
Birmingham."

This letter was signed by the plaintiff, and was produced at the trial; but it was objected on the part of the defendant, that inasmuch as the bill had no heading by which it would appear that the defendant was the party chargeable therewith, the letter could not be looked at to supply that defect, by connecting the bill with its contents, and that, therefore, the requisites of the statute had not been complied with. This objection was overruled by the sheriff, and a verdict returned for the plaintiff for 10*l.* 11*s.* 11*d.*

Crompton having in Easter Term obtained a rule, calling on the plaintiff to shew cause why a nonsuit should not be

entered (*a*), or a verdict for the defendant, or why a new trial should not be had.

F. Gunning now shewed cause. All that the statute requires is, that at least a month before the commencement of an action, a bill of costs shall have been delivered to the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, &c., which bill shall either be subscribed with the proper hand of such attorney, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill (*b*). There is no provision that the bill should be headed in any particular form. The words "to be charged therewith," do not necessarily import that the bill itself is to contain evidence of that fact. That fact, it is submitted, may be gathered from the letter in which the bill is enclosed. The letter must of necessity be looked at, to see if the bill enclosed is referred to in it; and if it can be looked at for that purpose, it may also be admitted to shew that the bill enclosed, is a bill enclosed to the party chargeable therewith. The former statute, the 2 Geo. 2, c. 23, s. 23, also

(*a*) It did not appear on the sheriff's notes that there was any leave reserved to enter a nonsuit, or a verdict for the defendant on the second issue; and the rule could not, therefore, be supported on these points.

(*b*) 6 & 7 Vict. c. 73. sec. 37—"That from and after the passing of this act no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor, (or, in the case of a partnership, by any of the partners, either with his own name, or with the name or style of such partnership,) or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill," &c.

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required that the bill should be delivered "to the party to be charged therewith;" and under that statute it was held, that it was sufficient, where the party in the course of a cause had changed his attorney, and a Judge's order had been obtained by the second attorney for the delivery of a signed bill by the first attorney, that he had delivered it to the second attorney; *Vincent* v. *Slaymaker* (*a*). The object of the statute is clearly only to provide against actions being brought by attornies for their bills of costs, before the party against whom the action is brought has had an opportunity of examining the items.

Crompton, in support of the rule. This is a bill which upon the face of it does not charge any one. The intention of the statute in requiring a bill to be delivered, is to give the fullest information to the party chargeable therewith. In *Lewis* v. *Primrose* (*b*), it was held that the bill should be headed in the Court and cause in which the costs are incurred; here there is neither Court nor cause. [*Wightman*, J.—The objection as to the want of heading in a Court, was not taken at the trial.] It is submitted that under the 37th section of the 6 & 7 Vict. c. 73, the name of the party who is sought to be charged, should appear on the face of the bill itself.

Cur. adv. vult.

WIGHTMAN, J.—This was an application to set aside a verdict in an action upon an attorney's bill, on the ground that no bill properly signed or entitled so as to indicate the party to be charged therewith, had been delivered to the defendant. A bill entitled "assignees' costs not taxed up to filing the last account," had been sent to the defendant enclosed in a letter addressed to him, and signed by the plaintiff, and which letter directly referred to the bill, and, if taken in connection with it, left no doubt as to the person charged. The question was, whether the plaintiff was entitled to read the letter and the bill together, to shew

(*a*) 12 East, 372. (*b*) Q. B. Trinity Term, 1844.

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who was the person to be charged therewith. It appears to me that the plaintiff may do so, under the 37th section of the 6 & 7 Vict. c. 73. That section enables the plaintiff to connect the letter and the bill, if the latter is referred to, for the purpose of the signature of the party sending it; but as the letter and the bill must both be read in order to ascertain if there be a reference or not, it seems to me sufficient, under the act, if the bill and the letter together shew who is the person to be charged. The rule will, therefore, be discharged.

Rule discharged.

REGINA *v.* The Justices of MONTGOMERYSHIRE.

Where by the practice of sessions twenty-eight days' notice of trial was required to be given in the case of respited appeals, and where that notice had not been given, and the sessions therefore refused to hear the appeal, and confirmed the order of removal: *Held*, that the practice was not so unreasonable as to induce this Court to grant a mandamus, commanding the sessions to enter continuances and hear the appeal.

The quarter sessions are the judges of their own rules of practice; and this Court will not interfere with their determinations respecting them, unless the rules on which they have acted are so unreasonable as to be illegal.

THIS was an application for a mandamus to the Justices of Montgomeryshire, commanding them to enter continuances and hear an appeal of the churchwardens and overseers of Llanycil, in the county of Merioneth, against an order of two justices for the removal of Hugh Hughes and his family from the parish of Carno, in the county of Montgomery, to the said parish of Llanycil. It appeared upon affidavit, that the order of removal had been made on the 18th December, 1843, and a copy of it and the notice of chargeability served on the appellant parish on the 20th of the same month, and the paupers removed on the 13th January, 1844. At the next April sessions, the appeal was entered and respited; and at the same time an order of the Court was drawn up, that the appellants should serve the respondent parish with a copy of the order adjourning the appeal, at least twenty-eight days before the sessions at which the trial was to take place. No notice of trial, or of the appeal having been entered and respited were, however, forwarded to the respondent parish, until the 19th of June, 1844; on which day, being only fourteen clear days before the July sessions, the appellants sent a notice of trial

5 Dowl. 268.
6 — 11 — 5 Jur. 738.
22 Law J. Rep. 32 (Mag. C.)

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and grounds of appeal. On the appeal being called on at those sessions, an objection was made that by the practice of the sessions twenty-eight days' notice was required to be given in the case of respited appeals. The sessions accordingly refused to hear the appeal, and confirmed the order of removal. A copy of the rules of practice at these sessions, was annexed to the affidavit. One of these rules was as follows:—"Every notice of appeal to be given in writing by the appellants or their solicitors to the respondents or their solicitors, eight clear days before the sessions, if the cause of appeal shall have arisen, or happened time enough to admit thereof, unless otherwise directed by statute. Notice of prosecuting adjourned appeals to be given in like manner twenty-eight clear days before the sessions; and unless the appellants prosecute the appeal with effect at the said then next sessions, the order of removal to stand confirmed."

A rule nisi having been obtained in Michaelmas Term last,

Bodkin now shewed cause. The question in this case is, whether the notice of trial in cases of adjourned appeals, required by the rules of the Court of Quarter Sessions, is so unreasonable that this Court will interfere to review their decision. The principal case on this subject is *Rex* v. *Justices of Wiltshire* (*a*). There the Court granted a mandamus to hear an appeal, which the sessions had refused to entertain, on the ground that the notice of trial had not been given on or before the Monday in the week preceding the sessions. But in that case, it appeared that the rule of practice was a new one, promulgated two sessions before, but then first acted upon, and which was not known to the appellant's attorney, who had given the former usual notice. There was also this additional fact, although it is not alluded to in the judgment, that the sessions, on the objection being made, had refused to adjourn the appeal,

(*a*) 10 East, 404.

erroneously conceiving that, as the appeal had been entered and respited at a previous sessions, they were bound to come to a final determination at these sessions, under the 9 Geo. 1, c. 7, s. 8. In the case of *Rex* v. *The Justices of Norfolk* (*a*), where the Court decided against the validity of a rule of sessions requiring one calendar month's notice of the entry and respite of the appeal, the decision proceeded upon such a rule controlling in effect the terms of the 9 Geo. 1, c. 7, s. 8, which only required that a reasonable notice should be given. But it has since been generally acknowledged, that that statute only applies to the first sessions after the order of removal has been sent, and to which the appeal is made; and that the Court will not interfere with the discretion of the magistrates at the second as to adjournment, if it is in furtherance of a reasonable practice; *Rex* v. *The Justices of Monmouthshire* (*b*). Then the question is, whether, in the present case, the practice requiring twenty-eight days' notice of prosecuting the appeal, is so unreasonable as to call for the interference of this Court, and it is submitted that it is not. When parties suffer their rights to lie dormant for so long a period of time, as in the present case, where six months have intervened between the execution of the order of removal, and the notice and grounds of appeal being given; a longer notice than is requisite in ordinary cases ought to be given by them to the other side, who may fairly suppose that they mean to acquiesce in the order.

Townsend and *Pashley* in support of the rule. The sessions had no right to require twenty-eight days' notice of trial to be given, and to refuse to hear the appeal because such notice had not been given. A notice of such length is unreasonable, and is contrary to the practice of other sessions, where the notice varies from six to fourteen days. The recent act for the amendment of the poor laws, the

(*a*) 5 B. & Ad. 990; See S. C. 3 N. & M. 55.
(*b*) 3 Dowl. 306.

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4 & 5 Wm. 4, c. 76, s. 81, only requires the grounds of appeal to be delivered fourteen days before the trial. In the case of moving to set aside an award, not under 9 & 10 Wm. 3, c. 15, the Court generally requires the party to come within the same time as if the award were under the statute, construing the provisions of the statute as an exposition of what reasonable time in such a case ought to be considered. In the ordinary case of trials in this Court, so long a period is never required. The Legislature has pointed out in 14 Geo. 2, c. 17, s. 4, what shall be the proper notice of trial in town causes, which it requires shall be ten days' notice at least, when the defendant resides above forty miles from town. By the recent statute 6 & 7 Vict. c. 89, s. 5, which empowers the Court in certain cases to grant a rule absolute in the first instance for a mandamus, the notice of the application for the rule need only be given ten days before. If, therefore, the practice in other cases is not to require so long a notice, it may be fairly deemed unreasonable; and if so, this Court will exercise its jurisdiction over the justices to compel them to hear this case. What is reasonable is for the Court to decide. "Reasonableness," says Lord *Coke*, "belongeth to the knowledge of the law, and therefore, to be decided by the justices;" *Co. Litt.* 56, *b.* This Court will controul the Court of Quarter Sessions, where it appears that their rules of practice are unreasonable; *Rex* v. *Justices of Norfolk* (*a*), *Rex* v. *Justices of West Riding* (*b*), *Regina* v. *Justices of Merionethshire* (*c*), *Rex* v. *Justices of Lancashire* (*d*), *Rex* v. *Justices of Wiltshire* (*e*), *Reg.* v. *Justices of West Riding* (*f*). As a general principle there is no doubt that this Court has the power, and will exercise it, of reviewing the decisions of inferior Courts; *Rudyard's case* (*g*). In giving judgment

(*a*) 5 B. & Ad. 990.

(*b*) 5 B. & Ad. 667; S. C. 2 N. & M. 390.

(*c*) 1 Car., Ham. & Allen's New Sess. Cases, p. 277; See S. C. 1 D. & M. 121.

(*d*) 7 B. & C. 691.

(*e*) 10 East, 404.

(*f*) 2 Q. B. 705; S. C. 1 G. & D. 630.

(*g*) 2 Ventr. 22.

in *Regina* v. *Dunn* (*a*), Lord *Denman*, C. J., says, "It may be enough on this occasion to observe that the Court of King's Bench has, in fact, controlled the decision of the justices, whether in or out of sessions, to a much greater degree than was supposed at the bar." In *Rex* v. *Justices of Staffordshire* (*b*), Lord *Denman*, C. J., says, "The sessions have no right to introduce a new condition of appeal which is not in the statute."

Cur. adv. vult.

WIGHTMAN, J.—This was a rule for a mandamus to the justices to enter continuances and hear an appeal against an order of removal. The order was made in December, 1843, and the pauper was removed in November, 1844. The appeal was entered and respited at the April sessions, and notice and grounds of appeal were given fourteen clear days before the first day of the July sessions. The practice of the sessions required twenty-eight days' notice of trial, and because that notice had not been given, the sessions refused to hear the appeal.

The question was, whether the rule of practice of the sessions, requiring twenty-eight days' notice instead of fourteen, was so unreasonable that this Court would interfere, and compel them to alter their practice, and shorten the time of notice? Several cases were cited, but none were applicable, but those in which the question was, how far this Court would interfere, on the ground that the sessions had adopted an unreasonable practice.

Rex v. *The Justices of Wiltshire* (*c*), *Rex* v. *The Justices of Monmouthshire* (*d*), *Rex* v. *The Justices of Lancashire* (*e*), *Rex* v. *The Justices of the West Riding of Yorkshire* (*f*), were all cited, and the result of those cases, and indeed of all the later authorities, seems to be this; that the Quarter Sessions are the judges of

(*a*) 12 A. & E. 616.
(*b*) 4 A. & E. 844; See S. C. 6 N. & M. 477.
(*c*) 10 East, 404.
(*d*) 3 Dowl. 306.
(*e*) 7 B. & C. 691.
(*f*) 5 B. & Ad. 667.

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their own rules of practice, and that this Court will not interfere with their determinations respecting them, unless the rules upon which they have acted, are so unreasonable as to be illegal.

In the present case, the rule requiring twenty-eight days' notice of trial of an adjourned or respited appeal, where no previous notice has been given, though it seems unnecessary, can hardly be said to be so unreasonable that the Court would interfere on that ground. The interval between one sessions and another leaves ample time for the giving such a notice; and it appears therefore to me, that in this case the Court ought not to interfere with the determination of the sessions.

Rule discharged.

HIGGINS *v.* DIXON.

In an action on a guarantee, the declaration stated a promise by the defendant that in the event of A. M. making default in payment of a sum of money, he the defendant would immediately on such default, pay the same to the plaintiff. In the guarantee itself, the terms were "in the event of A. M. making default, I will, immediately upon such default being made, *and a letter being sent to me addressed, &c., giving me notice of such default*, pay, &c:" *Held*, that there was a material variance between the declaration and the guarantee; the former alleging an absolute promise to pay on default, while the promise in the latter was coupled with the condition of sending a letter, &c., which was a material qualification.

ASSUMPSIT on a guarantee. The declaration stated, that one A. Mangeon was indebted to the plaintiff in 15*l.* 3*s.*; that the plaintiff had commenced an action in the Common Pleas against the said A. M. for the recovery of that sum, which action was pending at the time of the after-mentioned promise of the defendant; that in consideration of the premises, and that the plaintiff, at the request of the defendant, would forbear and give time to the said A. M. for the payment of the said sum, and interest at four per cent., on the 26th of October then next, the defendant undertook and promised, and guaranteed the plaintiff, that in the event of the said A. M. making default in payment of the said sum, &c., the defendant would, immediately on such default being made,

pay to the plaintiff the said sum of 15*l.* 3*s.*, or so much thereof as should then remain unpaid, together with interest, &c. It then proceeded to aver, that the plaintiff, confiding, &c., did forbear, &c.; that A. M. made default, &c., of which the defendant had notice. Breach; that the defendant, though requested, had not paid the said sum of 15*l.* 3*s.*, and interest, &c.

The defendant pleaded non-assumpsit, on which issue was joined; and other pleas not material to the present case.

The cause was tried before the sheriff of Middlesex, and the guarantee, which was given in evidence, was in the following terms:—

"In the Common Pleas. { "*Higgins* v. *Mangeon.*

"In consideration of the above named plaintiff having granted the defendant time for payment of the debt herein, being 15*l.* 3*s.*, together with interest thereon after the rate of four per cent. per annum, from the 12th day of July, 1843, I, the undersigned, do hereby undertake, guarantee, and agree, by way of collateral security, that in the event of the defendant making default in payment of the said judgment debt on the 26th day of October next, I will, immediately upon such default being made, *and a letter being sent to me, addressed to No.* 62, *Gower Street, Bedford Square, giving me notice of such default,* pay the amount due, or so much thereof as shall then remain unpaid to the plaintiff, together with interest thereon as aforesaid. And it is hereby expressly understood, that nothing herein contained shall be deemed or construed to be taken as a release of the judgment already signed herein, but as a suspension only for the space of six months. "R. DIXON."

It appeared from the undersheriff's notes, that a letter was posted by the plaintiff, addressed to "— Dixon, Esq.,

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Gower Street, New Road," but that there was no evidence that it had been received by the defendant.

Several points were raised at the trial; those now material being, that it did not appear that a letter had been sent to the defendant according to the guarantee, and that there was a variance between the guarantee and the declaration.

The plaintiff recovered a verdict for 16*l.* 13*s.*

Ogle had obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, (*a*) or a new trial had.

Hoggins now shewed cause. The principal question is, whether there is a variance between the guarantee and the declaration. The consideration for the defendant's promise is the giving time to A. Mangeon; the promise is to pay on her making default; and the mode of giving notice of such default, by a letter to Gower Street, is not a condition precedent: there is, therefore, no variance. The guarantee cannot be taken as given in consideration of time being allowed, and of notice of default: notice must always be given; it is a matter of evidence, not of contract. It appears from the undersheriff's notes to have been proved, that notice was sent to the defendant, by a letter addressed to him in Gower Street, which letter, in the absence of evidence to the contrary, he must be assumed to have received.

Ogle, in support of the rule. There is clearly a variance between the guarantee and the declaration. The promise as alleged in the declaration is absolute, to pay on default of the principal; in the guarantee another condition is made, that a letter should be sent to the defendant, addressed to No. 62, Gower Street, Bedford Square, giving notice of the principal's default. This is a condition precedent to

(*a*) From the undersheriff's notes, it did not appear that leave had been reserved at the trial to enter a nonsuit.

the plaintiff's right to recover, and as such should have been set out in the declaration, and performance of it averred. This is not done, and, therefore, there is a material variance. But even if the declaration be sufficient, it does not appear from the evidence that a proper letter was sent; a particular address is mentioned and stipulated for in the guarantee, and the letter sent was to a different address. If it could be assumed in favour of the plaintiff, that a letter sent to the correct address had been received, that cannot be the case where the address was incorrect. If the plaintiff chose to vary the address given him, it was for him to prove that the letter was received. [*Coleridge*, J.—I think the letter is a compliance with the condition, and that it must be taken to have been received. The only point really to be considered is the question of variance.]

Cur. adv. vult.

COLERIDGE, J., afterwards (*a*) delivered judgment.—This was a rule for a nonsuit or new trial, on grounds which were all disposed of on the argument but one, now to be considered.

The action was on a guarantee, which, after stating the consideration, proceeded thus, "I, the undersigned, do hereby undertake, guarantee, and agree, by way of collateral security, that in the event of the defendant making default in payment of the said judgment debt, on the 26th day of October next, I will, immediately upon such default being made, *and a letter being sent to me, addressed to No. 62, Gower Street, Bedford Square, giving me notice of such default*, pay, &c.

The declaration omitted, in setting out the promise, any mention of the sending the letter; and this, it was alleged, constituted a variance; and it appears to me that the objection is well founded. There was no original debt between

(*a*) In Trinity Vacation.

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the plaintiff and this defendant; no duty on the latter to pay the money for which this action is brought, except what arose from the special contract between the parties. The defendant had a right to limit the contract by such terms as he thought fit to impose, and he is not liable except those terms are complied with. This cannot be said to be an immaterial term in the case of liability on default of a third person; it therefore qualified the contract, making it conditional, whereas on the declaration it appeared to be absolute.

It does not appear by the sheriff's note that any leave was reserved to enter a nonsuit, and upon the affidavits it is expressly denied that any was; the rule, therefore, must be absolute for a new trial.

Rule absolute accordingly.

REGINA *v.* MILNER, Clerk, and Another.

An order in bastardy under the 7 & 8 Vict. c. 101, s. 3, stated that application had been made and summons granted by a justice of the peace "usually acting in" the division in which the mother resided: *Held*, that under the 8 Vict. c. 10, the word "in" was to be taken to be synonymous with the word "for," contained in the forms given in the schedule to that act; and that, consequently, the order shewed jurisdiction on the part of the magistrate granting the summons.

A RULE had been obtained in Easter Term last for a certiorari, to bring up the following order for the purpose of being quashed:

"Westmoreland, to wit. At a petty session of her Majesty's Justices of the peace for the county of Westmoreland, holden in and for the division of East Ward, in the county of Westmoreland, at the Shire Hall at Appleby, in the said county, on the 18th of January, 1845, before us, Joseph Milner, clerk, and William Hopes, two of her Majesty's Justices of the peace for the said county.

"Whereas, one Rebecca Blackett, single woman, residing at Street House, in the parish of Warcop, within this division, did, on the 9th of January, 1845, having been delivered of a bastard child, within twelve calendar months prior thereto, make application to Joseph Milner, clerk,

See post 341.
9 Q B 38.

one of her Majesty's justices of the peace, usually acting in this division, for a summons to be served upon one John Gregson the younger, of Warcop, aforesaid, whom she alleged to be the father of the said child; and the said justice thereupon issued his summons to the said John Gregson the younger, to appear at a petty sessions to be holden on this day for this division, to answer her complaint touching the premises.

And whereas, &c. (stating the appearance of the putative father, the hearing, and an order on the putative father).

(Signed,) "JOSEPH MILNER," (L. S.)
"WILLIAM HOPES," (L. S.)

The objection was, that it did not appear that the justice issuing the summons, was a justice of the peace acting for the petty sessional division in which the mother of the child resided.

Addison now shewed cause. It is submitted, that as it appears upon the face of this order, that the summons was granted by a magistrate usually "acting in" the division, in which the woman resided, the jurisdiction of the magistrate to make the order is sufficiently shewn. The 8 Vict. c. 10, was expressly passed to discourage mere technical objections like the present. The first section of that statute enacts, "that where any proceedings have been had or taken"—"in matters of bastardy under the provisions of the said recited act, and shall have been set forth according to the forms in the schedule hereunto annexed, or to the like tenor or effect, the same shall be taken respectively to have been and to be valid and sufficient in law." The present order is precisely in the same form as that given in the schedule of the act, except that there the justice is stated to be a justice of the peace acting "for" the division, and here the word used is "in." It is submitted, that this is sufficient, it being clearly "to the like tenor and effect." But even should the Court

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think otherwise, as no form is given by the 7 & 8 Vict. c. 101, and the forms given by the 8 Vict. c. 10, are not imperative, it perhaps was not necessary to shew on the face of this order, that the party had been summoned. In *The King* v. *Stone* (*a*), it was held, that a conviction before a justice of the peace on the Game Laws, which stated that the defendant was present at the time when the information was read and the witnesses examined, and that when called on for his defence he produced no evidence, and did not require any further time, was sufficient; without stating that he was previously summoned to answer.

Bliss, in support of the rule. A justice of the peace acting "in" a place, may yet be acting out of his jurisdiction. It is a mere designation of locality, and does not shew jurisdiction on the part of the magistrate granting the summons. If that be not shewn, then the justices had no right to make the order.

COLERIDGE, J.—I think the intention of the Legislature in passing the 8 Vict. c. 10, manifestly was to discourage such objections as the present. Without meaning to say that "in" and "for" are synonymous terms, I find on reference to the forms given in the act, that they seem to be used there as such; and I therefore think that this objection cannot be sustained (*b*).

Rule discharged.

(*a*) 1 East, 639.

(*b*) In the act itself, the 7 & 8 Vict. c. 101, s. 2, the complaint is to be made to a justice of the peace acting "for" the petty sessional division, &c., who is to summon the party to appear at a petty session, to be holden, &c. "for" the petty sessional division, &c., "in which such justice usually acts." And in the forms given in the 8 Vict. c. 10, the justice is stated to be acting "for" the petty sessional division, &c., and summoning the party to appear at a petty sessions to be holden for the division "in which the justice usually acts."

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REGINA *v.* WALKER and Others, Esquires.

Where the sessions had refused, on the application of the guardians, to make an order of affiliation under the 2 & 3 Vict. c 85: *Held*, that they were nevertheless bound to entertain the complaint of the mother under the 7 & 8 Vict. c 101, if made within the time limited by that act.

A RULE had been obtained, calling on Richard Walker, John Grundy, and James Openshaw, Esquires, three of the keepers of the peace, and justices in and for the county of Lancaster, and usually attending at and acting for the petty sessional division of Bury, in the said county, to shew cause why a writ of mandamus should not issue to them, commanding them to proceed upon an application made to them at a petty sessions held on the 31st of January, 1845, by Anne Openshaw, single woman, for an order upon William Porter Holt, as the putative father of a male bastard child, born of the body of the said Anne Openshaw, and to hear and determine such application at a petty sessions to be held for the said division, as by adjournment from the said petty sessions held on the 31st of January.

It appeared from the affidavit in support of this rule, that one Anne Openshaw, a pauper, having been delivered of a bastard child, and having become chargeable to the parish of Elton, within the Bury union, the guardians of the poor for that union had made an application to the Bury petty sessions under the 2 & 3 Vict. c. 85, s. 1, for an order upon the putative father to reimburse the union for the maintenance and support of the child. Notice of their intention to apply had been given to William Porter Holt, the alleged father of the child, calling on him to appear at the Bury petty sessions on the 9th of August, 1844; on which day he accordingly appeared, and entered into recognizances, under the 2 & 3 Vict. c. 85, s. 3, to try the matter at the quarter sessions for the county. On the same day, the 9th of August, 1844, the 7 & 8 Vict. c. 101, was passed. At the next quarter sessions, the case was adjourned by consent to the following sessions, when it was heard, and the Court of Quarter Sessions refused to make any order.

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On the 18th of January, 1845, and consequently within the time limited by the 7 & 8 Vict. c. 101, s. 2, (the child having been born on the 26th of March, 1844,) the mother of the child made an application under that act, to the petty sessions, for a summons against the putative father. A summons was accordingly granted, requiring Holt to appear at the petty sessions to be held at Bury, on the 31st of January. On that day he accordingly appeared by counsel, and contended, that an application having been already made by the guardians of the poor, which had been heard by the quarter sessions and dismissed; the petty sessions had no authority to entertain this second application. The magistrates treating this objection as fatal, refused to hear the complaint of the mother; upon which the present rule had been obtained.

Martin and *Gray* now shewed cause. The magistrates acted rightly in refusing to entertain this application. The former order, being that of a Court of Quarter Sessions, was decisive on the point; *Rex* v. *Tenant* (*a*); *Rex* v. *Jenkin* (*b*). It will be said, perhaps, that the former order being made on the application of the guardians of the poor, and the latter on that of the mother of the child, that she is not bound by the prior decision to which she was no party; and that a new substantive right is given to her by the recent statute, 7 & 8 Vict. c. 101. But the answer is, that the former application being for the same purpose, namely, for the support and maintenance of the child, and she being a witness in support of it, she may be said in point of fact to have been a party to it. Besides, this inconvenience might result from a contrary construction, that where the order by the guardians has been successful, if the mother could also obtain an order, the father might be burthened with the support of the child twice over.

(*a*) 2 Str. 716; See S. C. 2 Ld. Raym. 1423.
(*b*) Cas. temp. Hardw. 301.

By the 9th section of the 7 & 8 Vict. c. 101, it is provided, that "all proceedings actually pending before justices in quarter sessions or petty sessions at the time of the passing of this act may be continued, and orders made therein in the same manner as if this act had not been passed." Here the proceedings were pending before the quarter sessions when the act passed; and therefore, their decision, when pronounced, was final. [*Wightman*, J.—One of the conditions for an order for payment to the guardians is, that the child should be chargeable. Suppose that the mother is afterwards enabled to keep the child, could she not apply under the recent act?] In that case it would be a mere revival of the order, with a change of the party to whom the money was to be paid. In the present instance the sessions have adjudicated in favour of the father, and this application is in fact to re-hear their decision.

Archbold, in support of the rule. It is not necessary to consider the inconvenience of two orders for the support of the same child, which it is said may exist; as in the present case, the quarter sessions have made no order on the father. The former statute was in favour of the parish on whom the child had become chargeable; the present statute is in favour of the mother, giving her a certain support for her child; and her right to that support cannot be taken away except by express words.

WIGHTMAN, J.—It seems to me, that under the terms of the 7 & 8 Vict. c. 101, I must make this rule absolute. By the second section of that act, on the application by the mother of a bastard child within twelve months after the birth of the child, or within six months before the passing of the act, the justice is required to grant an order summoning the putative father to appear before the petty sessions; and by a subsequent section, the sessions are required to hear the evidence which she may adduce, and entertain or dismiss her application. In the present

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instance, the sessions have refused to do so, considering that they were bound by a decision to which the Court of Quarter Sessions had come upon a former application at the instance of the guardians of the union, for an order on the putative father, to reimburse their expenses. It is contended, that some inconvenience might ensue were the sessions to entertain this application; as sect. 9 enacts, that previous orders shall be valid; and thus, if an order could be made in favour of the guardians, and another in favour of the mother, there might be two orders for the same purpose existing at the same time. But as in the present case the quarter sessions have made no order, I do not think that it is necessary for me to determine that question. It seems to me that the words of the act leave no discretion; that the mother is within them, and is entitled to make the application, which the sessions are bound to entertain; and that the present rule must therefore be absolute.

Rule absolute.

HENRY ROBINSON *v.* WILLIAM HENRY ROBINSON.

A warrant of attorney, dated the 4th of April, 1844, was given by the defendant to the plaintiff, the defeasance to which stated it to be for securing 1300*l.* and interest on the 15th of April, and authorized the issuing of execution for the whole of the principal and interest then due, with costs, &c., in default of payment. At that time the defendant owed 514*l.* to the plaintiff, who was also liable as a surety for 237*l.* When execution issued, the amount of debt and liabilities was 1110*l.*, including bills accepted by the plaintiff for the accommodation of the defendant, after the giving of the warrant of attorney, some of which were not due. The amount levied was 1085*l.*: *Held*, that affidavits were admissible to shew the intention of the parties to have been, that the warrant of attorney should be a security for future liabilities, as well as for existing debts, not exceeding 1300*l.*; and also to shew that the accommodation acceptances had been given with that understanding.

The warrant of attorney was filed under 3 Geo. 4, c. 39, s. 1, on the 24th of April, 1844, with an affidavit stating that deponent "was present on the 4th day of April, 1844, and did see the within named W. H. R. sign, seal, and, as his act and deed, deliver the within warrant of attorney:" *Held*, that the affidavit sufficiently shewed that the warrant of attorney was executed within twenty-one days of its being filed.

IN this case a rule had been obtained by the assignees of the defendant, W. H. Robinson, a bankrupt, calling on the plaintiff to shew cause why the judgment and execution which had issued on a warrant of attorney given by the

16. 2/3. [illegible]

defendant to the plaintiff should not be set aside; and why the sum of 1085*l.* 6*s.* 6*d.*, which had been levied under the judgment, should not be refunded to the assignees. The rule was granted on two grounds; first, that it did not appear from the affidavit of the attesting witness, which had been filed, together with the warrant of attorney, under 3 Geo. 4, c. 39, s. 1, that the warrant of attorney had been filed within twenty-one days of its execution; and, secondly, that the execution had issued for more than was due to the plaintiff at the time of giving the warrant of attorney. That instrument bore date the 4th of April, 1844, and the defeasance stated that it was for securing the payment of 1300*l.* and interest, on the 15th of that month, and, in default of payment, authorized the issuing of execution for the whole of the principal money and interest which should be then due, together with costs, &c.

This warrant of attorney was filed on the 24th of April, 1844, and the affidavit filed with it in pursuance of the statute stated, "that the deponent was present on the 4th day of April instant, and did see the within named W. H. Robinson sign, seal, and, as his act and deed, deliver the within warrant of attorney, and also sign the defeasance thereunder written."

On the 1st of November, 1844, judgment was signed, and a fi. fa. issued, indorsed to levy 1342*l.* 0*s.* 4*d.*, with interest on 1303*l.* 10*s.*, at 4*l.* per cent. from that day; and, on the 5th of November, the sheriff levied to the amount of 1085*l.* 6*s.* 6*d.*, and executed a bill of sale of the goods levied to the plaintiff. On the 11th of March, 1845, the defendant was declared a bankrupt, a fiat having issued on the 26th of February, on an act of bankruptcy committed on the 6th of the previous November.

Affidavits were put in on both sides, from which and from the examinations in the Court of Bankruptcy at Birmingham, it appeared that the plaintiff was the father of the defendant; that at the time of giving the warrant of attorney, the defendant was indebted in 514*l.* 14*s.* 11*d.* to

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the plaintiff, who was also liable as surety for the defendant in 237*l.* 0*s.* 6*d.*; that the plaintiff, in pursuance of a promise made at the time of giving the warrant of attorney, accepted, on the 9th of May, 1844, for the accommodation of the defendant, bills of exchange to the amount of 1146*l.* 12*s.* 4*d.*; and that at the time of issuing execution, the amount of debt and liabilities, including some of the bills then current, was 1110*l.* 14*s.* 10*d.* The plaintiff and defendant both swore in their affidavits that the warrant of attorney was given to secure not only what was actually due at the time of its execution, but also such further advances as the plaintiff should make to the defendant, and such sums as he should become liable to pay on his account, not exceeding in the whole 1300*l.*, and interest thereon.

Whitehurst now shewed cause. [He took a preliminary objection to one of the affidavits on the part of the defendant, that the examinations in bankruptcy which were referred to as exhibits, were not intituled in the cause, and therefore might not be those which were exhibited to the deponent; the Court, however, gave no decision on the point, but admitted the documents de bene esse.] As to the first point, a warrant of attorney not duly filed according to the provisions of 3 Geo. 4, c. 39, is fraudulent and void only as against assignees. The second section of that act entitles them to recover back what has been levied under such a warrant of attorney for the use of the creditors. They ought, therefore, to have brought trover, or an action for money had and received. If the warrant of attorney be now set aside, it is made void as against all the world, and the statute gives no such summary power to the Court. The question is one of much importance, and ought to be raised on the record, by bringing an action, so as to obtain the judgment of a Court of Error. It is true that in *Dillon* v. *Edwards* (*a*), it was held that the words "such warrant

(*a*) 2 M. & P. 550.

of attorney," in sect. 2, included the affidavit required by sect. 1; but even if that decision be law, which is to be doubted, it is not applicable to the present case. There the deponent only swore that he saw "a certain warrant of attorney, bearing date the 25th of April, 1827, signed, sealed, &c.;" and there was nothing to shew that he saw it executed on the day on which it bore date, or on any day within twenty-one days of the filing. In the present case the meaning of the affidavit is plain, the instrument bears date the 4th of April, and the deponent swears that he was present on that day, and saw the defendant execute it. The objection is, that he does not say that he "then" saw; but no doubt can be entertained of his meaning, or that perjury might be assigned on that allegation. As to the other branch of the case, the refunding what has been levied, the affidavits give a complete answer; and there is no doubt of the perfect legality of a warrant of attorney to secure future advances and liabilities. The case of *Duke* v. *Watchorn* (*a*) is in point, as shewing that the instrument is to be construed according to the intention of the parties. It is true that the express terms of a defeasance cannot be got rid of; but here the defeasance is silent on the subject, and the levy is within its terms. It appears distinctly from the affidavits that the bills were accepted by the plaintiff on the faith of the warrant of attorney, and that that instrument was always intended to be a security for future liabilities.

Martin and *H. Hill*, in support of the rule. On the first point, *Dillon* v. *Edwards* (*b*) is a direct authority for the proposition, that a defect in the affidavit, in not shewing the time of the execution of the warrant of attorney, renders the latter void under sect. 2; and that case has never been overruled, nor is any conflicting decision to be found. If so, this is precisely the case in which the Court

(*a*) 1 Dowl. 265, N. S. (*b*) 2 M. & P. 550.

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will proceed summarily; the defect is of the same kind as that in *Dillon* v. *Edwards* (*a*); indeed, the affidavit is exactly such as a party wishing to commit a fraud would make. If it were wished to procure the enrolment of a post-dated instrument, it could not be more artfully done; every word of the affidavit may be true, and yet the warrant of attorney may have been executed with a blank for the date long before. The act is express that the affidavit shall state the time of the execution; such in fact is the only object of an affidavit at all; but if the present is held to be sufficient, an easy way of evading the law is pointed out. The true test is, whether it is consistent with the affidavit that the deponent did not see the execution on the 4th of April. If it be, no intendment can be made against the literal construction of the statute. As to the second question, it is true that there is nothing illegal in a warrant of attorney to secure advances; but when it is a question of the intention of the parties, the instrument itself must be looked to; and the broad question is, whether a party who has taken a warrant of attorney for a specific sum, with interest from its date, can apply it as security for money subsequently advanced, or liabilities subsequently incurred? The case of *Duke* v. *Watchorn* (*b*), shows that a warrant of attorney, like any other instrument, is to be construed according to the intention of the parties; but not that such intention is to be collected otherwise than from the instrument itself. Even if it be admitted, however, that the defeasance may be explained by affidavits, yet that would not show that a party can be at liberty to issue execution for more than is actually due at the time to which it refers; and, in the present case, the words of the defeasance expressly limit it to the sum then due, which was less than 600*l.*; whereas execution has issued for more than 1300*l.* In *Duke* v. *Watchorn*, the facts were very different; there the plaintiff was empowered to take out

(*a*) 2 M. & P. 550.

(*b*) 1 Dowl. 265, N. S.

execution for the whole or any part of the bills. It is therefore contended, that supposing the affidavit to be sufficient, the execution can be good only for the amount actually due on the 15th of April, or at most, only for what had been actually advanced at the time of the execution.

Cur. adv. vult.

COLERIDGE, J. (*a*), now delivered judgment.—This was an application to set aside a judgment and execution upon a warrant of attorney, and to compel a refunding of the money levied. The application is made on behalf of the assignees of the defendant, who has become a bankrupt. The rule was applied for on several grounds, but granted on two only; the first being a supposed defect in the affidavit of the time of execution, required by the 3 Geo. 4, c. 39, and founded on the decision of the Court of Common Pleas in *Dillon* v. *Edwards* (*b*). In that case it was determined that the second section of the act made the warrant, judgment, and execution, void as against the assignees, unless there were an affidavit filed of the time of the execution of the warrant. It was urged that that decision ought to be reviewed; as to which it would be enough for me to say, that there is at least so much to be said for it, that it would not become me, even if I entertained doubts as to its soundness, to overturn it. But in truth, it does not apply in its facts to the present case. There the witness swore "that he was present, and saw a certain warrant of attorney, a true copy whereof was annexed, bearing date the 25th April, 1827, duly signed, sealed, and delivered." These words neither state when the witness was present, nor when the warrant was executed; if, therefore, it be necessary for the affidavit to state the time of the execution, this was clearly insufficient. In the present case, the affidavit states that the witness was present on the 4th day of April, 1844, and

(*a*) In Trinity Vacation. (*b*) 2 M. & P. 550.

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saw the within named W. H. Robinson, sign, seal, and as his act and deed deliver, the within warrant, &c. Here the day on which the witness was present is stated. The objection is, that it is not stated that he saw the execution on the same day; and it is certainly possible that he may have seen the execution on some other day, more than twenty-one days before the 13th April, on which day the affidavit was sworn. But it would not be reasonable or candid so to interpret these words, and thereby to invalidate the warrant; if the execution were not on the 4th of April, and in the witness's presence on that day, there would be no sense in swearing to his presence at all, any where, or with any one on that day; no purpose in stating it, but a dishonest one, the purpose to deceive; and I think the Court ought not to proceed on such an assumption, but to understand the affidavit in the sense which it must bear, if sworn honestly and sensibly.

Next it is said, that the warrant was given to secure 1300*l.*, together with costs, &c., the writ indorsed to levy 1342*l.*, the actual levy 1085*l.*; whereas the debt existing at the date of the warrant did not exceed 600*l.*; and the case of *Duke* v. *Watchorn* (*a*), was relied on by both sides in the argument. The plaintiff and defendant, who are father and son, both swear that the warrant of attorney was required and given to secure not only the then existing debt, but the liabilities under which the plaintiff might come for the defendant, not exceeding the specified amount of 1300*l.*; and there seems no reason to doubt the truth of this statement, or that at the date of the execution, the original debt, with the liabilities or acceptances given for the defendant, exceeded the amount of the actual levy. The case cited shews that the intention of the parties is to govern; there, indeed, the intention was gathered from an agreement recited in the defeasance, here the defeasance is silent as to this; but then the levy is within the terms of

(*a*) 1 Dowl. 265, N. S.

the defeasance, and the execution is sought to be avoided only by importing the fact, that a less sum was due than the amount indorsed on the writ; and I see no objection on the other hand to the resorting to extrinsic evidence, to explain why that larger sum was levied. In that case my Brother *Patteson* is reported to have said, that "the question was to be decided by looking at the instrument itself, and ascertaining from it as well as one might be able, the intention of the parties." There the instrument itself did disclose the intention of the parties, but I rather doubt, from the language of the judgment, that that was the only source of information to which in any other case recourse might be had. Here if you look to the instrument alone, the execution is warranted; if you go beyond the instrument, in order to make it fraudulent, it seems to me clear, that you may also have recourse to the same means to set it up. Else the same witness might tell the whole story; the first part of his evidence shewing the amount of the actual debt would be received; the latter which explained the former would be rejected; and so upon the whole a falsehood conveyed. This would be clearly absurd. As this levy then has not exceeded what, by the language of the instrument itself and the agreement of the parties it is lawful for the plaintiff to raise by it; and as by the bankruptcy of the defendant, it is clear that the plaintiff will have to satisfy the outstanding acceptances; I see no ground for impeaching the transaction in any part. The rule will, therefore, be discharged, but without costs.

Rule discharged accordingly.

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BARTON *v.* WARREN.

Where judgment and a summons to stay proceedings are due at the same time, the latter must be attended before judgment can be signed, even though it be such as an adverse order cannot be made on.

A summons to stay proceedings is waived by the delivery of a plea before the summons is due.

THIS was an action on a promissory note. The time for pleading expired on the 19th of May. On that day, a summons to stay proceedings on payment of debt and costs in a fortnight, returnable on the 20th, at eleven o'clock, A.M., was served on the plaintiff's attorney. At half past ten o'clock on the morning of the 20th, the defendant delivered a plea, which being considered by the plaintiff to be an abandonment of the summons, he made up the issue, and delivered it, with notice of trial, in the evening of that day. A second summons, similar to the first, returnable on the 21st, was served, but not attended by the plaintiff's attorney, as he refused to consent to such stay of proceedings. The issue, &c., were returned on the evening of the 21st, at which time a summons for leave to withdraw the plea and suffer judgment by default was served on the plaintiff's attorney. This summons was attended, and an order was made, that the defendant should be at liberty to withdraw his plea, and that final judgment by confession should be entered for the amount of the debt and costs. On the taxation of costs, the defendant's attorney objected to the allowance of the costs of any proceedings subsequent to the first summons. They were, however, allowed by the Master, and he made his allocatur accordingly.

Martin had obtained a rule to shew cause why the taxation should not be reviewed, against which,

Lush now shewed cause. No order could have been made on the first summons without the consent of the plaintiff. There is a resolution of all the Judges, that they have no power to give a defendant time to pay debt and costs on a future day without the consent of the plaintiff. A summons on which no adverse order can be made is no stay of proceedings. [*Wightman*, J.—Have you any autho-

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rity that such a summons is not a stay of proceedings? It would be very inconvenient to raise the question continually, whether a summons is such as an adverse order can be made on.] It is for the other side to shew that such a summons is a stay of proceedings. The defendant ought to have applied to the plaintiff for his consent before taking out the summons. But even if it were a stay of proceedings, the delivery of a plea before the summons was due, amounted to an abandonment of it, being inconsistent with a stay of proceedings.

Martin, in support of the rule. The only point is, whether the delivery of the plea operated as a waiver of the summons; and the only reason for delivering it was, to prevent the plaintiff from signing judgment, which he might otherwise have done before attending the summons.

WIGHTMAN, J.—I understand from the Master the practice to be, that where judgment and a summons are both due at eleven o'clock, the summons must be attended before judgment can be signed; and if the summons be dismissed, the defendant may immediately deliver his plea. I consider, therefore, that by pleading before the return of the summons, the defendant had waived it. The rule must, therefore, be discharged, with costs.

Rule discharged accordingly.

NORMANBY *v.* JONES.

ATKINSON had obtained a rule to set aside a judgment on the ground (amongst others) of irregularity. The irregularity complained of was this; the defendant demurred

The rule of practice that an order must be drawn up and *served* before the other party is in a situation to take a fresh step, in order to operate as a stay of proceedings; applies to an order to amend on payment of costs to be taxed.

4 Dowl. 814.
4 C.B. 477.

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to the declaration, and demanded a joinder in demurrer; the time for joining in demurrer expired on Monday. On the Saturday before, the plaintiff's attorney had taken out a summons to amend, returnable at three o'clock on Monday; both parties attended, and between four and five o'clock the order was made, and drawn up about five o'clock, but never served. The order was an order to amend upon payment of costs to be taxed. At the opening of the office on Tuesday, at eleven o'clock, the defendant signed judgment.

Bovill shewed cause, and contended, that as the time for joining in demurrer had expired, and the order was not served, the defendant was justified by all the authorities in signing judgment.

Atkinson, in support of the rule. The practice that a rule must be drawn up and served before the other party is in a situation to take a fresh step in order to operate as a stay of proceedings (*a*), does not apply to a conditional order of this kind. It is an order "to amend on payment of costs to be taxed," and to get the costs taxed, the usual course is to take the original order to the Master's office, to get an appointment indorsed upon it, and then to serve it.

WIGHTMAN, J. (after consulting Master *Bunce*) said, that the rule was universal, and that this order ought to have been served before the time for signing judgment; but on terms made the

Rule absolute.

(*a*) See *Kenney* v. *Hutchinson*, 6 M. & W. 134; S. C. 8 Dowl. 171; *Sandford* v. *Alcock*, 10 M. & W. 689; S. C. 2 Dowl. 463, N. S.; 2 *Archb. Prac.* 1201, 7th ed.

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MAZEMAN *v.* DAVIS.

A temporary and limited protection from arrest, granted by a commissioner of the Court of Bankruptcy, under the stat. 7 & 8 Vict. c. 70, s. 7, upon the examination of a debtor's petition, cannot be renewed or extended by the commissioner.

THE plaintiff obtained judgment against the defendant in this Court, in Trinity Term, 1845, and afterwards issued a writ of exigi facias, tested on the 8th day of July, 1845. The defendant, on the 7th of July, 1845, petitioned the Court of Bankruptcy under the statute 7 & 8 Vict. c. 70; and Mr. Serjt. Goulburn being the commissioner appointed to examine into the matter of the said petition, on the 14th of July, made the following order, directing a meeting of all the creditors of the petitioner to be convened, and granting the petitioning debtor a protection from arrest until the 4th of October:

"In the Court of Bankruptcy.

London, the 14th day of July, 1845.

"Whereas, James Phineas Davis, of Carlisle Street, Soho, attorney at law, a debtor unable to meet his engagements with his creditors, and not being a trader, within the meaning of the statutes now in force relating to bankrupts, did, on the seventh day of July instant, with the concurrence of one-third in number and value of his creditors, present his petition to this Honourable Court, under the provisions of the statute passed in the Parliament holden in the 7th and 8th years of the reign of her present Majesty Queen Victoria, intituled "An Act for facilitating arrangements between debtors and creditors:" I, one of the commissioners of her Majesty's Court of Bankruptcy, having examined into the matter of the said petition, in manner directed by the said act, and being satisfied thereupon of the several matters required by the said act, do hereby direct that a meeting of all the creditors of such petitioning debtor, be convened at No. 18, Aldermanbury, in the city of London, on Wednesday, the first day of October, at eleven o'clock in the forenoon; and I appoint George Green an official assignee of this Court, president of such meeting,

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to preside thereat, and report the resolutions thereof to me: And I do hereby order, that the said James Phineas Davis, shall be protected and free from arrest pursuant to the terms of the said statute, from the date hereof, until Saturday, the fourth day of October next, at the Court of Bankruptcy, at three o'clock in the afternoon."

"EDWARD GOULBURN,
Commissioner."

This protection was renewed by the following indorsement:—

"In the Court of Bankruptcy.

4th October, 1845.

"I, one of the commissioners of her Majesty's Court of Bankruptcy, authorized to act in the matter of the within-mentioned petition, do hereby extend the protection of the said James P. Davis, till the 18th day of October, at three o'clock in the afternoon, at the Court of Bankruptcy aforesaid."

"EDWARD GOULBURN,
Commissioner."

There were two further extensions in the same terms, reaching up to the 6th of December, 1845.

Two meetings of the petitioner's creditors were held, on the 1st and 18th days of October respectively, pursuant to the statute 7 & 8 Vict. c. 70, ss. 4 and 5 (*a*); and at the last

(*a*) Sect. 4. "That if at such meeting of creditors the major part in number and value, or nine-tenths in value, or nine-tenths in number whose debts exceed twenty pounds, shall assent to the proposal of such petitioning debtor, or to any modification thereof, the president of such meeting shall appoint another meeting of the creditors of such petitioning debtor to be held not earlier than seven or later than twenty-eight days from such first meeting, of which second meeting, and of the purpose thereof, notice in writing shall be personally served on every creditor who was not present by himself or his appointed agent at such

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of those meetings, a resolution or agreement was signed by more than one-third of the creditors of the petitioning debtor, present at such last meeting. Within fifteen days after the passing of the resolution or agreement, it was submitted to the commissioner, and filed with the proceedings in pursuance of the 6th section (*a*). Between the 14th of July

first meeting, three clear days at least before the day appointed for such second meeting; provided, however, that the commissioner to whom such petition as aforesaid is referred may, if he shall think fit, make an order, in any special case, that service of such notice at the last place of abode or business of any creditor shall be deemed good service."

Sect. 5. "That if at such second meeting of creditors three-fifths in number and value of all the creditors present, or nine-tenths in value, or nine-tenths in number whose debts exceed twenty pounds, shall agree to accept such arrangement or composition as was assented to at the said first meeting of creditors, and shall reduce the terms thereof into writing, and sign the same, such resolution or agreement (subject to such confirmation as is herein-after enacted) shall thenceforth be binding and of full force, as well against the said petitioning debtor as against all persons who were creditors of the said petitioning debtor at the date of his said petition, and who had notice of the said several meetings of creditors; provided, however, that such resolution or agreement shall not be valid unless one full third in number and value of all the creditors of such petitioning debtor were present at such second meeting, either in person or by an authorized agent."

(*a*) Sect. 6. "That within fifteen days next after the passing of such resolution or agreement the same shall be submitted to the commissioner acting in the matter of the said petition, who, if he shall think the same reasonable and proper to be executed under the direction of the said Court, shall cause the same to be filed and entered of record therein, and shall grant to the said petitioning debtor a certificate of such filing, and shall from time to time indorse on such certificate his protection of such petitioning debtor from arrest; and such petitioning debtor shall be free from arrest at the suit of any person being a creditor at the date of his said petition, and having had such several notice or notices as aforesaid; and any officer arresting such petitioning debtor at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioning debtor, shall be liable to such penalty as is provided respecting bankrupts in the like case by the statutes now in force concerning bankrupts; provided, however, that no such protection shall be valid

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and the 4th of October, during the currency of the original order of protection, the defendant was arrested at the suit of the plaintiff, on a writ of exigi facias; but was immediately liberated by the officer, upon producing the above order of protection signed by the commissioner. On the 14th of November, the defendant was again arrested, upon a writ of exigi facias, at the suit of the plaintiff; but although he then produced the extended order of protection signed by the commissioner, the officer refused to discharge him from custody; and at the time of making the present application he was still detained in custody.

Upon an affidavit setting forth these facts, *Bramwell* had obtained a rule to show cause why the defendant should not be discharged out of the custody of the sheriff, as to the execution at the suit of the plaintiff, the defendant having obtained his protection from arrest under the 7 & 8 Vict. c. 70.

Martin and *Bagley* now shewed cause; upon an affidavit of the plaintiff's attorney, shewing that no notice whatever had been given to the plaintiff, his attorney, or agent, of the meetings of creditors ordered to be held under the act, or either of them; and that although the agreement or resolution come to at the meeting of creditors, was within fifteen days of such meeting submitted to the commissioner, and the same was filed with the proceedings pursuant to the 6th section of the act; yet the commissioner had not granted to the defendant a certificate of such filing, and indorsed on such certificate his protection from arrest. They contended, that as it was clear beyond dispute that the protection on which the defendant relied, was a pro-

in favour of any petitioning debtor who shall be proved to have been about to abscond beyond the jurisdiction of the said Court of Bankruptcy, or who has concealed or is concealing any part of his estate or effects, nor against any creditor whose debt is not truly specified in the said petition, nor against any creditor whose debt has been contracted by reason of any manner of fraud or breach of trust."

tection granted under section 7 (*a*) "upon the examination of the petition," and not a protection indorsed by the commissioner under section 6; the commissioner had no power to extend the protection so given. In this case the commissioner acted specially, under the express provisions of the act of Parliament from which alone he derived authority; and section 7 only empowered him to grant "a temporary and limited protection," for such time as should be specified therein. When it was meant that the commissioner should have power to extend the protection, it was so expressed; as in the 6th section, where it was enacted that the commissioner should, "from time to time indorse on such certificate his protection." They also argued, that even if the commissioner had power to extend the protection granted by him upon examination of the petition, such protection would not be operative against the plaintiff; as he was a creditor at the date of the petition, and had not received any notice of the meetings held under sections 4 and 5.

Bramwell, contrà, admitted, that the protection on which the defendant relied, was granted under section 7. The object of the act was, that the petitioner should be protected from arrest during the whole of the proceedings, and it would be impossible to effect this object, unless the com-

(*a*) Sect. 7. "That it shall be lawful for such commissioner as aforesaid, upon the examination of such petition as aforesaid, to grant to such petitioning debtor a temporary and limited protection from arrest, and such petitioning debtor shall be accordingly free from arrest for such time and within such limits and conditions as shall be specified in the said protection, with the like penalties on any officer arresting him as aforesaid; and it shall be lawful for such commissioner to require such petitioning debtor to give bail for his appearance at the said several meetings of his creditors; and every petitioning debtor shall have such protection from arrest when going to, remaining in, and returning from his necessary attendance on the said commissioner, or the said meetings of creditors, as is enjoyed by any party or witness attending any Court of Record."

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missioner had power to extend the protection. This view had been acted upon by all the commissioners at Basinghall Street: and any other construction of the statute would render it in a great degree inoperative; as it would be impossible to expect the petitioner to attend the meetings of his creditors, if he were liable to be arrested at such meetings. It was fairly to be inferred that the Legislature meant to invest the commissioners with all the power necessary to carry the act conveniently into operation. As to the want of notice to the plaintiff, it could not affect a protection granted under section 7. That protection was to be granted upon the presentation of the petition, and before any creditor could have notice.

PATTESON, J.—I confess, I should have scarcely thought that the construction to be put upon this act admitted of any doubt, if Mr. *Bramwell* had not stated that those who have to act under its provisions, entertain a different opinion. I have, therefore, considered the seventh section with much attention; and am of opinion, that although it empowers the commissioners, upon the examination of the debtor's petition, to grant him a temporary and limited protection from arrest; yet it does not authorize the granting any further order of protection, or the extension of that order for any further period of time. It is said, however, that this construction will prove very inconvenient in practice; but I do not see that such will necessarily be the case. By the second section, the commissioner, if satisfied of the truth of the matters alleged in the petition, is to direct a meeting of the creditors to be convened at such time and place as he shall appoint; and if, at that meeting, certain facts concur, the president of that meeting, who is to be appointed by the commissioner, shall, by the fourth section, fix another meeting of the creditors, on a day not earlier than seven, nor later than twenty-eight days from such first meeting. The resolution of this second meeting is, by the sixth section, to be communicated within fifteen

days to the commissioner, who is thereupon empowered to grant a protection from arrest to the petitioner under that section. It seems to me, therefore, that the commissioner can have no difficulty in calculating the time which will necessarily elapse, before he can be in a situation to grant the further certificate of protection under the sixth section; and in making his first order accordingly. The words of the seventh section are, "that it shall be lawful for such commissioner as aforesaid, upon the examination of such petition as aforesaid, to grant to such petitioning debtor a temporary and limited protection from arrest." It gives no power at any other time or times. Where it is the intention of the Legislature to do so, it is expressed in terms; as in the sixth section, where he is authorized "from time to time to indorse on such certificate his protection of such petitioning debtor from arrest." The intention of the seventh section is, that the debtor may be free from the fear of arrest during the time he is taking the proceedings, under the preceding section, to obtain the assent of his creditors to his proposition; and with this view, the protection thus given is to be binding as against all his creditors, whether having notice of the proceedings or not: whereas the certificate granted under the sixth section protects him as against such creditors only as have had due notice of the meetings. I do not think it is material to consider whether the creditor in this instance had notice; inasmuch as this order of protection, if valid at all, can only be so as an order made under the seventh section, which, as before stated, applies equally as against all creditors, whether having notice or otherwise. For the above reasons, I am of opinion that the arrest was proper, and that this rule must, consequently, be discharged; but under the circumstances without costs.

Rule discharged without costs (*a*).

(*a*) This case was decided in Michaelmas Term, 1845.

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REGINA *v.* The Justices of the WEST RIDING of YORKSHIRE.

(ST. PANCRAS *v.* BRADFORD.)

A notice of appeal, against an order of removal, beginning "We the undersigned, being a majority of the churchwardens and overseers of the parish of," &c., and signed by one churchwarden and four overseers, (there being six altogether in the parish,) is sufficient; without stating that they were the majority at a meeting duly convened.

PICKERING had obtained a rule nisi in Michaelmas Term last, for a mandamus to the justices of the West Riding of Yorkshire, commanding them to enter continuances, and to hear an appeal against an order of two justices for the removal of George Hill and Hannah his wife, from the township of Bradford, in the said Riding, to the parish of St. Pancras, in the county of Middlesex.

The affidavit in support of this rule stated that on the appeal coming on to be heard before the sessions, an objection was taken, that as no notice and grounds of appeal had been given within twenty-one days after service of the order of removal, and as it did not appear that any actual removal had taken place, the parties had no right to appeal. The sessions decided that this was a valid objection, and therefore refused to hear the appeal (*a*).

4 Dnl-647
11-2/3-911.

In opposition to this rule an affidavit was made, shewing that another objection had also been taken at the Court of Quarter Sessions. That upon the respondents requiring the appellants to prove that they had regularly given their notice and grounds of appeal required by the statute, a witness was called by the appellants, who proved that there were six churchwardens and overseers of the appellant parish, and that the notice given was in the following terms :—

"St. Pancras, Middlesex *v.* Bradford.

"Touching the settlement of George Hill, and Hannah his wife.

"Take notice, that we the undersigned, being a majority of the churchwardens and overseers of the parish of, &c., do intend, &c., to prosecute an appeal," &c.

(*a*) See *Regina* v. *Justices of West Riding*, *ante*, vol. 2, p. 486.

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That it was signed by one churchwarden and four overseers. That it was then objected that the notice was not duly signed; as it was not shewn that it was signed by the whole of the churchwardens and overseers of the appellant parish, or by a majority of that body, duly constituted, and assuming to act in the name of the body. That the sessions pronounced this objection also to be fatal.

Hall and *Pashley* now shewed cause. If the objection stated in the affidavit on which this rule was obtained, had been the only one on which the Court of Quarter Sessions had acted, it is conceded that their decision could not have been upheld (*a*). But as our affidavit shews that another objection was also entertained by the Court of Quarter Sessions, the question arises not only whether that objection was not decisive against the hearing of the appeal; but also whether a party against whom a decision has been given in a Court below upon two grounds, can come to this Court, and ask to reverse that decision, without acquainting this Court with both those objections. It is submitted he ought not to be permitted to do so; as such a practice would have the effect of bringing the justices here to support a decision, which this Court, upon hearing the whole facts of the case, might perhaps have no hesitation in confirming. But if the Court should be of opinion that the appellants, notwithstanding this defect in their affidavit, are entitled to be heard in support of this rule; then it is submitted that the objection disclosed in our affidavit is a fatal one, and that the quarter sessions acted rightly in dismissing the appeal. If the ultimate decision of the Court of Quarter Sessions be right, although perhaps founded on wrong reasons, this Court will uphold it. Upon this principle were decided the cases of *Rex* v. *Skeffington* (*b*), and *Reg.* v. *The Justices of the West Riding* (*c*). The decision of the sessions in the present case,

(*a*) See *Regina* v. *Justices of West Riding*, *ante*, vol. 2, p. 488.

(*b*) 3 B. & A. 382.

(*c*) 2 Q. B. 705; See S. C. 1 G. & D. 630.

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it is submitted, was correct. The statute of 9 Geo. 1, c. 7, s. 8, required that no appeal from any order of removal should be proceeded upon in any Court of Quarter Sessions, "unless reasonable notice be given by the churchwardens or overseers of the poor of such parish or place, who shall make such appeal unto the churchwardens or overseers of the poor of such parish or place, from which such poor person or persons shall be removed." This statute, therefore, did not authorize a majority of the churchwardens and overseers to give the notice. By the subsequent statute, 4 & 5 Wm. 4, c. 76, s. 81, it is enacted that "the overseers or guardians of the parish appealing against such order," (*i. e.* an order of removal) "or any three or more of such guardians, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing under their hands of the ground of such appeal;" or otherwise that it shall not be lawful for them to be heard in support of the appeal. This statute authorizes "any three or more" of the guardians to give the notice, but says nothing about a majority of the parish officers. It is true that in the case of *Rex* v. *The Justices of Warwickshire* (*a*), the Court there says, in giving judgment, that they think the notice by a majority of the officers without fraud is good; but it would seem that in that case the notice did not purport, as in the present case, to be signed by the majority. It was signed in point of fact by two churchwardens and four overseers; and the objection there really was that it had not also been signed by an assistant overseer of the parish. The same remark applies to the subsequent case of *Rex* v. *The Justices of Derbyshire* (*b*), where, however, the decision of the Court turned also upon another point. The principle upon which these decisions must be taken to have proceeded, is to be found in

(*a*) 6 A. & E. 873; See S. C. 2 N. & P. 153.
(*b*) 6 A. & E. 885; See S. C. 1 N. & P. 703.

the case of *Grindley* v. *Barker* (*a*); namely, that where a power of a public nature is committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. That case was acted on in *Cortis* v. *The Kent Waterworks' Company* (*b*) and *Rex* v. *Whitaker* (*c*). Where a majority has the power to act, it is not quâ the majority of the corporate body, but quâ the corporate body itself. If the notice in this case were good, and had to be averred in pleading, it must be averred to be a notice by the churchwardens and overseers, and not a notice by the majority of the churchwardens and overseers. In *Robinson* v. *James* (*d*), which was an action for the recovery of poor-rates, the declaration averred that the vestrymen at a certain meeting made a certain poor's rate; and it was objected in arrest of judgment, that as the consent of the majority of the vestry meeting was necessary to impose a valid rate, the declaration should have shewn the rate to be made by a majority; but Mr. J. Coleridge, in giving judgment in that case, says:—"Unless a majority concurred, it is not true that the vestrymen made the rate, and the form adopted is the correct mode of stating in pleading, that the majority, or whatever number were necessary to make a valid rate, have, in fact, concurred in making it." A binding majority must be a majority at a meeting convened for the purpose; *Rex* v. *Kynaston* (*e*); *Rex* v. *Theodorick* (*f*). This is the case of a quasi corporation acting by their wrong name; *Ex parte The Overseers of Harnley* (*g*), and *Ward* v. *Clarke* (*h*).

Pickering, contrà, was not called upon.

WILLIAMS, J.—I think that this rule must be made absolute. I agree with the principle which has been laid down, that a party who seeks to obtain a mandamus to

(*a*) 1 B. & P. 229.
(*b*) 7 B. & C. 332.
(*c*) 9 B. & C. 648.
(*d*) 1 Dowl. 756, N. S.
(*e*) 2 Selw. N. P. 1143, 6th Ed.
(*f*) 8 East, 543.
(*g*) *Ante*, vol. 1, p. 673.
(*h*) 12 M. & W. 747; See S. C. *ante*, vol. 1, p. 1027.

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compel the sessions to alter the determination to which they have come, should state to the Court all the facts upon which the sessions have adjudicated; and that if any be kept back, it may be considered as a collusion practised to deceive this Court. But in order to hold that to be so, the facts omitted must be substantial and material facts, which I do not think is the case in the present instance. There were two objections raised at sessions, one of which, as to the notice of appeal not having been given within twenty-one days, was very properly abandoned on the argument. The other, to which I think there is as little weight to be attached, is that the notice of appeal was not signed by the churchwardens and overseers or by a majority purporting to have authority. It is not disputed that a notice of appeal would be sufficient if signed by the majority of the parish officers; but it is argued that it ought to appear to be the act of the whole body; and that the presumption is that they did not all consent, unless it be stated that they did. I think, however, that the presumption is the other way; and that in order to render the notice insufficient, it lay on the other side to shew that the persons giving it were not really a majority competent to do so. It, therefore, seems to me that the notice was perfectly good, and that this rule must be made absolute.

Rule absolute.

In re SIMONS,
and in a cause between
SIMONS and PEACOCK.

Where an action was brought by the plaintiff, an attorney in the country, to recover a bill of costs against the defendant, who was the solicitor to the Post-office, for business done in conducting the prosecution of an individual at the suit of the Post-master general, for forging a Post-office order; for which purpose he had been employed by the defendant: *Held*, that the Court had no power to refer the bill for taxation; and that the fact that the plaintiff had debited the defendant with the whole of the charges, did not the less render it a bill for agency business.

1 Exch R. 14
4 — " — 38.

THIS was an action for work and labour as an attorney, &c., in conducting a Post-office prosecution. Before plea

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In re SIMONS.

pleaded, a Judge's order had been obtained to refer the bill for taxation. A rule nisi had now been granted to rescind that order.

It appeared upon the affidavits that the plaintiff was a country attorney, the defendant, the solicitor to the Post-office, and that the action was brought to recover certain charges incurred in a prosecution, instituted at the suit of the Post Master General, against an individual in South Wales, for forgery of a post-office order. The plaintiff, it appeared, had been employed by the defendant to conduct the case at the assizes; but part of the business, including the preparing the briefs, had been done by the defendant himself, and forwarded to the country. The defendant had also, by his brother, appeared at the assizes, and conducted the case; but had left the paying of the witnesses and other incidental matters connected with the case to the plaintiff. The bill, it appeared, did not charge the plaintiff, as was usual in cases of agency business, with a part only of the charges so incurred; but, on the contrary, charged him with the whole as in the case of attorney and client.

Hugh Hill shewed cause. It is not intended to dispute the law as laid down in the case of *In re Gedye* (*a*), that a London agent's bill is not within the 6 & 7 Vict. c. 73, sec. 37, and therefore not taxable. Consequently, if in this case the bill is for such business, it is conceded, that it cannot be taxed. But it is submitted that the present case differs widely from the one alluded to. There the decision proceeded mainly on the ground, that a "London agent" was a party well known, and would have been included eo nomine in the act, had such been the intention of the Legislature. Here the plaintiff is a country attorney, and all that appears contradicts the fact, that the business was agency business strictly so called. The charges are not, as agency charges always are, for a pro-

(*a*) *Ante*, vol. 2, p. 915.

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portionate part, but for the whole amount of the items. And the bill is consequently as between attorney and client; and it can make no difference that the defendant happens to be an attorney, if the bill does not treat him as such. The 12 Geo. 2, c. 13, sec. 6, which exempted agents' bills from taxation, clearly only applied to agents' bills, technically so called. "Agency business," in its technical sense, is business done by one attorney for another on a different scale of charges, than those between attorney and client; and on this ground the argument was mainly rested in *In re Gedye* (*a*). It is submitted, therefore, that this is not an 'agent's' bill; that it comes within the terms of the 6 & 7 Vict. c. 37, sec. 37; and is consequently liable to taxation.

Lush, in support of the rule. This is an agency bill, and comes within the decision in *In re Gedye*. It cannot matter what is the rate of charges, whether one-half or less, or the whole of each item. The true test is, whether this is business done by one attorney for the other, which the other was employed to do, and could have done himself, but which it was more convenient for him under the circumstances to get executed by another attorney. No particular rate of charge is necessary to constitute a bill one for agency business. It may be as in the present case, where the defendant had kept the more lucrative part of the business in his own hands, that the agent he employs to transact the other portions of the business, is fairly entitled to the whole of the charges. Where process is forwarded to an attorney in the country to execute, there he generally receives the whole of the charges; but the business is not less "agency business" on that account. Nor is it less an agency bill, because the agent is an attorney in the country, and not a London attorney. At any rate, if there be any overcharge, the defendant can dispute his liability before a jury.

(*a*) *Ante*, vol. 2, p. 915.

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He referred to *Ford* v. *Maxwell* (*a*); *Sandys* v. *Hornby* (*b*); *Cardale* v. *Bull* (*c*); and *Dixon* v. *Plant* (*d*).

Cur. adv. vult.

COLERIDGE, J., afterwards (*e*) delivered judgment.—This was a rule to rescind an order made for taxing an attorney's bill. The bill was incurred in the prosecution of an individual in South Wales for a forgery, and the Post Master General was the prosecutor. The defendant, Mr. Peacock, is an attorney, and the attorney for the Post-office. He had employed the plaintiff to conduct the prosecution. It appeared that he had himself prepared the brief, and in some other matters directly interfered in the conduct of the prosecution—those parts, as it was alleged, from which the greatest profit would be derivable to an attorney for a prosecution. The plaintiff's bill charged the defendant not with a proportion merely of the whole charges, as usual between attorney and agent, but with the full amount.

These are the facts—and upon these the question is, whether this bill is taxable under the 6 & 7 Vict. c. 73, sec. 37. In Easter Term last, a case of *In re Gedye* (*f*), was argued before me, and I there determined that an agent's bill remained not liable to taxation since the passing of this statute, as it was before. The present case was brought before me, and Mr. *Lush* and Mr. *H. Hill*, who argued it, distinctly stated that there was no desire on either side to question the law, as I had there laid it down. The case was argued on the assumption, that an agent's bill was not taxable in the common law Courts; and the only question made was, whether the present was to be considered an agent's bill? I desire to state this distinctly, not as inviting a reconsideration of that decision, but as

(*a*) 2 H. Bl. 589.
(*b*) 1 M. & Rob. 33. S. C. 4 C. & P. 520.
(*c*) 4 Q. B. 611.
(*d*) 1 Dougl. 200, n.
(*e*) In Trinity Vacation.
(*f*) *Ante*, vol. 2, p. 915.

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wishing not in any way to add any difficulty to its examination by the full Court on any future occasion.

The question, therefore now to be decided is one of fact —and it seems to me, that whether Simons was "agent" only, in the somewhat technical meaning of the word, or principal attorney, cannot depend so much on the rate of his charges, or the work he performed, as upon the relation which Peacock bore to the prosecutor. If the prosecutor employed Peacock to conduct this prosecution, in the course of which the work was done; and if Peacock, residing in London, and doing himself such parts of the work as could be performed in London, delegates to Simons residing in the country, such parts as must be performed there, because he does not choose to leave London and perform them himself; it seems to me that in the sense before mentioned, Peacock must be considered the principal, and Simons, by consequence, Peacock's agent. Here that was clearly the case; the work was to be done ultimately for the Post Master General, and he is liable; yet between him and Simons there was no contract whatever. Simons, therefore, worked as the servant, in other words, the agent of Peacock.

Simons has indeed chosen to make the same charges on Peacock, as Peacock could make on the Post Master General; thereby not sharing, but absorbing the whole of the profits. This is unusual; but this cannot alter the character of his service. It may be only a reason why a jury might upon a trial disallow some portion of his demand.

Adopting then the construction of the statute laid down in *In re Gedye* (*a*), I think this rule must be made absolute.

Rule absolute.

(*a*) *Ante*, vol. 2, p. 915.

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(*In the full Court.*)

ACTION on the case by a reversioner for an injury to his reversionary interest. The second count stated, that before the time, &c., a certain wall and building of the plaintiff, situate, &c., and also the close, piece, or parcel of land, upon which the said wall and building was erected and built, and also a certain messuage and building of the plaintiff, situate, &c., were in possession of one T. C., as tenant to the plaintiff; yet the defendant wrongly intending to prejudice the plaintiff's reversionary estate in the said wall and building, close and piece or parcel of land, messuage, &c., whilst, &c., to wit, on, &c., and on divers, &c., wrongfully, &c., took down, pulled down, prostrated, and caused to be taken down, pulled down and prostrated, a great part, to wit, 100 feet of the said wall and building, and wrongfully erected a great part of divers, to wit, four edifices, erections, and buildings upon part of the said wall and building of the said plaintiff, and also wrongfully erected a great part of four edifices, &c., upon the said close or parcel of land, and put large quantities, to wit, &c., of bricks, stone, and lime partly on the said wall and building, and partly upon the said close, and kept and continued, &c., and also wrongfully removed divers of the beams and bricks from the messuage or building; by means of which said several premises, &c., the said wall and building, and close, piece or parcel of land of the plaintiff became encumbered, damaged, and injured, and the messuage and building greatly damaged and injured, and the plaintiff by means thereof was greatly prejudiced, &c. in his reversionary estate and interest in and of the said

To an action on the case by a reversioner for an injury to his reversionary interest, the defendant pleaded that he was the occupier of the adjoining house and wall, and that whilst he was repairing his dwelling-house, by accident and against his will, and without any default on his part, it fell down; and in falling, fell upon the adjoining wall and close of the plaintiff, and threw the plaintiff's wall down; that thereupon the defendant, within a reasonable time, rebuilt the wall at his own expense, and in so doing committed the grievances mentioned in the declaration, quæ est eadem: *Held*, bad on special demurrer, for not shewing that the defendant had the leave and license of the tenant or of some party having authority, to allow him to come on the land.

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wall and building, close, piece, or parcel of land, and messuage and building so in the possession and occupation of the said T. C.

The defendant pleaded, fifthly: And for a further plea, &c., as to so much, &c., the defendant saith that the plaintiff ought not, &c., because he saith that before the said several times when, &c., he the defendant was the occupier of a certain dwelling-house near to and adjoining the said wall and close of him, the plaintiff. And he further saith, that before the said several times when, &c., to wit, on, &c., he, the defendant, repaired the said dwelling-house, and while he was repairing the same, by accident, and against his will, and without any default on his the defendant's part, it fell down to and upon the ground, and in so falling down, fell upon the said wall and close of him, the plaintiff, so adjoining as aforesaid, and threw the said wall down to and upon the ground; and the defendant further saith, that afterwards, and before the commencement of this suit, and within a reasonable time after the said accident, to wit, at the said several times when, &c., he, the defendant, in a careful and proper manner, and at his own expense, erected and built, and caused and procured to be erected and built, the said wall, in and above the said close, and kept and continued, and caused and procured to be kept and continued the same so for the space of time in the declaration mentioned; and the defendant further saith, that in and about the erecting and building of the same he, the defendant, at the said several times when, &c., did necessarily and unavoidably commit the grievance in the declaration mentioned, so far as they relate, &c., doing no unnecessary damage to the said close; and he further saith, that he thereupon and then, to wit, at the said several times when, &c., at his own expense, repaired all damage sustained by the plaintiff by reason of the premises in the introductory part of this plea mentioned. Quæ est eadem, &c. Verification.

Special demurrer and joinder.

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Whitehurst, in support of the demurrer, was stopped by the Court, who called upon

Atkinson to support the plea. An action on the case by a reversioner for an injury to his reversionary interest was termed in all the books an action on the case in the *nature of waste*; and was not so in name only, but really was the old action of waste in the *tenuit* (*a*); and as the matter contained in the plea would have been a good defence in the old action of waste in the *tenuit*, it should be admitted to be so in this action; *Com. Dig.* tit. "*Waste* (E 5); 2 *Inst.* 307; *Co. Litt.* 53 *a.*; *Br. Abr.* tit. "*Waste*," *pl.* 14, 39; *Ibid.* "*Cond.*" *pl.* 40; *Bac. Abr.* tit. "*Waste*" (E) (F). The name of the plea in the old action is "inevitable accident, and reparation before action brought." Waste would also lie against a stranger (*b*). [*Coleridge*, J.—How could you enter upon the land without the leave of the reversioner or his tenant?] That might be true if the action was in trespass qu. cl. fr. in the name of the tenant; but if the nature of the action was as described, this was not an essential. None of the old entries contained any such averment. He also contended that the plaintiff had sustained no temporal damage, and therefore could not maintain the action (*c*).

PER CURIAM.—We think the plea insufficient, for not alleging that the defendant entered with the leave and license of the tenant, or of some one who could give it.

Judgment for the plaintiff.

(*a*) *Arguendo*, *Young* v. *Spencer*, 10 B. & C. 145; See S. C. 5 M. & R 47.

(*b*) Bac. Abr. (Waste A.) That is not so. It will lie *against* the tenant, for waste done *by* a stranger.

(*c*) See *Young* v. *Spencer*, *supra*; *Governors of Harrow School* v. *Alderton*, 2 B. & P. 86, and *Rigg* v. *Parsons*, cited in 2 East, 156.

COURT OF COMMON PLEAS.

Trinity Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

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Trespass. Plea, that plaintiff had covenanted, with a proviso for re-entry in case of breach, not to set over or otherwise part with his lease. Breach, that he did set over his lease, to wit, by pawning, pledging, and mortgaging the said indenture of lease to certain creditors; wherefore the defendant entered.

TRESPASS for breaking and entering the plaintiff's farm, and cutting and carrying away the plaintiff's crop.

The seventh plea set out an indenture made on the 18th July, 1839, between one James Esdaile, of the one part, and the plaintiff of the other part, whereby Esdaile demised and leased the farm in which, &c., to the plaintiff, for the term of twenty-one years, from Michaelmas, 1839, subject to certain covenants: one of which was, that the plaintiff, his executors, &c., should not, nor would at any time during the said term, &c., sow, crop, receive, or take off or from the said arable lands, by the said indenture demised, or any part thereof, more than two crops of any sort of corn or grain successively; but should and would, every third

Replication, that he did not set over the said indenture by pawning, pledging, or mortgaging the said indenture to the said supposed creditors: *Held*, that the replication was bad, it traversing an immaterial allegation laid under a videlicet, and therefore too large.

Another plea alleged that the plaintiff covenanted, with a proviso for re-entry in case of breach, that he would not sow, crop, receive, or take from the arable lands or any part of them, more than two crops of corn successively; but would every third year summer fallow or lay the arable land down with rye grass, and clover seeds, or plant with potatoes, or sow with peas or beans, which should be twice well hoed. Breach, that he did sow and take three crops of wheat successively, and that he did not every third year summer fallow or lay the arable land with rye grass, and clover seeds, nor plant with potatoes, nor sow with peas, which were twice or at all well hoed; wherefore the defendant entered. Replication, that plaintiff did not sow, crop, &c., more than two crops, &c.; and did every third year summer fallow a part, &c., and lay down with rye grass, &c., another part, &c., and did sow another part, &c., with peas, and the residue of the arable land with beans, &c.: *Held*, on special demurrer, that the covenant against overcropping was distinct from that as to the mode of cultivation; that a breach of the former was well assigned, but not of the latter: that the replication was good as to the former, and not vitiated by the reference to the latter.

See 8 C - 3 - CB, 242.

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year summer fallow, or lay the said arable lands down with rye grass, and clover seeds, in a husbandlike manner, or should or would plant with potatoes, or sow with peas or beans, which should be twice well hoed; and also, that he, the plaintiff, his executors, &c., should not nor would at any time during the said term of twenty-one years, by the said indenture demised, let, set, demise, lease, assign, or set over, or otherwise part with, the said indenture, or the premises thereby demised, or any part thereof, to any person or persons whomsoever, without the special license and consent of the said James Esdaile, his heirs and assigns, in writing, under his or their hand or hands, for that purpose had and obtained. And it was by the indenture of lease provided and duly declared, that if the plaintiff, his executors or administrators, should at any time during the said term of twenty-one years, let, set, demise, lease, assign, or set over, or otherwise part with the said indenture, or the premises thereby demised, or any part thereof, to any person or persons, whomsoever, without such license or consent, as in the said indenture, and thereinbefore for that purpose was mentioned; or if the plaintiff, his executors, &c., should not in all things well and truly observe, perform, fulfil, and keep all and every the covenants, clauses, provisoes, articles, and agreements, in the said indenture contained, on his and their parts to be observed, performed, fulfilled, and kept according to the true intent and meaning of the said indenture; it should and might be lawful to and for the said James Esdaile, his heirs and assigns, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the said premises to have again, and from thenceforth hold and enjoy, as in his and their first and former estate, and the plaintiff, his executors and administrators, and all other occupiers of the same premises thereunto, and from thence utterly to expel, put out, and amove, anything in the said indenture contained to the contrary thereof, in anywise notwithstanding. The plea then set out a release of the reversion to the defendant.

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The eighth plea, after referring to the lease granted to the plaintiff, and the release of the reversion to the defendant, averred that after the making of those several indentures, and before the said time when, &c., the plaintiff did set over and part with the said indenture of lease, and the term thereby created, and his, the plaintiff's interest therein, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained, to wit, by pawning, pledging, and mortgaging the said indenture of lease to and with certain creditors of him, the plaintiff, to wit, one R. Watson, and one F. Broughton, without the special license or consent in writing of the said James Esdaile, or of the defendant, under their or either of their hands or hand, or in any other manner, for that purpose first had and obtained; whereupon the defendant entered in pursuance of the proviso for re-entry, and committed the alleged trespasses.

The tenth plea recited the covenant in the lease, as to crops and cultivation, alleged the assignment of the reversion to the defendant, and then proceeded to state, that during the continuance of the demise, and before the time when, &c., he, the plaintiff, did sow, receive, and take off and from divers, to wit, fifty acres of the arable lands, by the said indenture demised, and off and from every part thereof, more than two crops of corn successively, to wit, that the plaintiff then sowed, received, and took off and from the said arable lands, and the said fifty acres, parcel thereof, three crops of wheat successively; and that he, the plaintiff, did not, nor would every third year, or at any other time, or in any other manner, summer fallow, or lay the said arable lands down with rye grass, and clover seeds, in a husbandlike, or in any other manner, nor would plant with potatoes, nor sow with peas, which were twice, or at all, well, or in any other manner hoed; contrary to the covenant of the plaintiff, in the said indenture of lease in that behalf contained, and the condition of the same indenture: whereupon the defendant entered to enforce the forfeiture, and committed the trespasses, &c.

The plaintiff replied to the eighth plea, that he did not at any time during the continuance of the said demise, &c., set over or part with the said indenture of lease, or the term thereby created, or his, the plaintiff's interest therein, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained, by pawning, pledging, or mortgaging the said indenture of lease to and with the said supposed creditors of him, the plaintiff, in that behalf mentioned, or either of them, modo et formâ, &c.

The plaintiff replied to the tenth plea, that he did not, at any time during the said term of twenty-one years, sow, crop, receive, or take off or from the said arable lands, or any or either of them, or any part thereof, more than two crops of any sort of corn or grain successively; and did every third year summer fallow a part, consisting of divers, to wit, fifty acres of the said arable lands; and did lay down with rye grass and clover seeds, in a husbandlike manner, another part, consisting of divers, to wit, fifty other acres of the said arable lands; and did plant another part, consisting of, to wit, fifty other acres of the said arable lands with potatoes; and did sow another part consisting of divers, to wit, fifty other acres of the said arable lands with peas, and divers, to wit, the residue of the said arable lands, consisting, to wit, of fifty other acres of the said arable lands, with beans, which were twice well hoed; and that there was not at any time during the said demise, and before the said several times when, &c., any part or portion of the said arable lands, in the said indenture contained, which the plaintiff did not every third year of the said demise either summer fallow, or lay down with rye grass, and clover seeds, in a husbandlike manner, or plant with potatoes, or sow with peas or beans, which were twice well hoed, contrary to the covenant of the plaintiff in the said indenture of lease in that behalf contained, and the condition of the same indenture in the said plea set forth; concluding to the country.

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Special demurrer to the replication to the eighth plea, on the grounds that the plaintiff has thereby taken too narrow a traverse upon the defendant's said plea. That the plaintiff ought, by his said replication, to have denied generally that the plaintiff in any manner whatsoever had set over or parted with the said indenture of lease, or the term thereby created, instead of confining the issue to the alleged modes of parting with it, specified under a videlicet in the same plea, namely, by pawning, pledging, or mortgaging, those modes being so laid under a videlicet, and being thereby rendered not material, or such as would prevent the defendant from going into evidence of another or different mode of setting over or parting with the said lease, in and by way of violation of the same covenant, as, for instance, of a general assignment. That the plaintiff has no right to limit the defendant to evidence, excluding proof of a general assignment, or other mode of parting with the said lease, in violation of the plaintiff's covenant in that behalf, as he seeks to do by his said traverse of the said plea, and which would be the effect of an issue joined in the said traverse. That the plaintiff, in thus taking a traverse upon matter which was laid under a videlicet, has entirely given the go-by to the substance of the plea, and has violated the ordinary and well-established rules of pleading. That, by such a traverse, the plaintiff seeks to raise an immaterial issue. That, by such a traverse, the plaintiff seeks to entrap defendant into taking issue on an immaterial point, and one too narrow to admit of a decision of the merits. That such a traverse is intended to perplex and embarrass defendant in his rejoinder, and so avert a trial of any material question. That no safe, certain, material, or single issue can be taken on such replication. Joinder in demurrer.

Special demurrer to the replication to the tenth plea, on the grounds that the traverse taken by the said replication is too large. That the said replication offers to put in issue, and to affirm a matter out of the defendant's plea. That the

defendant's plea does not deny, or attempt to dispute or raise any issue upon the sowing of beans by the plaintiff in or upon the said demised premises; whereas the plaintiff seeks, by his traverse of the last plea, to involve that question in the issue. That in this the said traverse is too large, that the replication does not sufficiently avoid the said last plea; because, although the replication admits that part of the said demised premises were planted with potatoes and peas; it does not show that such potatoes and peas so planted, or any part thereof, were, or was twice, or in any manner hoed, as required by the said covenant in that behalf. That in this the same replication is repugnant and contradictory: first, by alleging an absolute performance of the said covenant mentioned and referred to in the said replication and last plea, and then by admitting a breach thereof. That the plaintiff, by offering to put in issue such sowing of beans, tenders an immaterial issue. That the said replication is double, by containing an allegation of entire observance of the covenants in the indenture of lease in the last plea mentioned, and a traverse of the particular breach of the same covenants in the same plea alleged, and also an allegation that the particular breach never happened. That it is impossible for the defendant to take any safe or single issue to the said replication. Joinder in demurrer.

Channell, Serjt., (*Shee*, Serjt., with him), in support of the demurrer. As to the replication to the eighth plea. By the covenant the plaintiff was bound not to part with the lease by any mode, whether by general assignment, pledging, or otherwise. The main question, therefore, between the parties is, whether he has done so? The statement in the plea, which is laid under a videlicet, is immaterial. The traverse of the defendant, consequently, involves a matter which is beside the substance of the issue between the parties. The replication, therefore, is bad. In *Com. Dig.* tit. "*Pleader*" (G. 15), it is said, "So a traverse, that by indenture A. bargained and sold, is bad, for it makes the indenture part of the issue."

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The cases of *Regil* v. *Green* (*a*), *Stubbs* v. *Lainson* (*b*), *Moore* v. *Boulcott* (*c*), recognised this principle. Next, with regard to the replication to the tenth plea. It was faulty in several respects. The covenant, it would be observed, contained an express stipulation that more than two successive crops of corn should not be taken. It then proceeded to give certain directions as to the mode of cultivation. The breach complained of in the plea was with reference to taking an undue number of crops, and had no relation to the mode of cultivation. The breach was complete without reference to it. Consequently, the plaintiff's traverse, by seeking to put in issue that part of the plea relating to the sowing potatoes, &c., was a traverse of irrelevant matter. Again, the replication concluded to the country. But the allegation as to the beans related to a matter not found in the plea; it was therefore introductory of new matter, and the pleading ought, consequently, to have concluded with a verification. But in any view, the replication was defective, as taking issue on a matter not alleged. The case of *Bishton* v. *Evans* (*d*), was an authority to that effect; that was an action of debt on a bond for 12,000*l.*, the declaration stated a consideration for the payment of 6,000*l.* with interest, the breach assigned was the non-payment of 6,000*l.* omitting the interest. The defendant pleaded that he had paid the 6,000*l.* and interest. On special demurrer the Court held the plea bad, as putting in issue, a fact of which no averment could be found in the opposite pleading. If facts were unnecessarily introduced into a pleading, the other side was not authorized to make them part of the issue. *Turnley* v. *McGregor* (*e*). Besides, the replication does not aver that the peas or beans were properly hoed according to the terms of the covenant. He referred also to *Lane* v. *Alexander* (*f*).

(*a*) 1 M. & W. 328.
(*b*) 1 M. & W. 728; See S. C. 5 Dowl. 162.
(*c*) 1 Bing. N. C. 323; See S. C. 1 Scott, 122.
(*d*) 2 C., M. & R. 12; See S. C. 3 Dowl. 735.
(*e*) *Ante*, vol. 1, p. 506; See S. C. 6 Scott, N. R. 906.
(*f*) Yelv. 122.

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Manning, Serjt., contrà. As to the demurrer to the former replication. The terms of the covenant were necessarily general, and comprised every mode in which the plaintiff could part with his interest in the lease. It was necessary, therefore, when the defendant alleged that a breach of the covenant had been committed, to state some particular matter. It would have been insufficient to state, generally, that the plaintiff had committed a breach of the covenant. Having stated this particular breach, it was competent for the plaintiff to take issue on it. But supposing that the defendant were not bound to plead thus particularly, he could not prevent the plaintiff from taking advantage of his unnecessary particularity. It was analogous to the case of a party alleging his title, where if he alleged a greater estate than was necessary to support his pleading, or with a greater degree of particularity, it was competent for the other party to traverse it in the terms of the pleading; *Lord Crumwell's case* (*a*). The case of *Robinson* v. *Turner* (*b*), was an authority in support of the plaintiff's mode of pleading. That was an action on an agreement to pay the plaintiff an annuity during a period of fourteen years, on condition that the plaintiff should not permit any one during that time to keep post-horses or post-chaises for hire on certain premises. The defendant pleaded, that the plaintiff permitted a certain person, to wit, John Thomas, to let divers post-horses and chaises on the premises, in breach of the agreement. The defendant at the trial, proposed to shew that the plaintiff had permitted a person named Slatehard to keep horses and chaises on the premises. The Court of Queen's Bench, on motion for a new trial, held, that although the name of John Thomas had been laid under a videlicet, it was not competent for the defendant to shew the name of any other person. Then with regard to the tenth plea. That plea was bad, as not disclosing a complete breach. The former part of the

(*a*) 3 Dyer, 365, b.

(*b*) Q. B. Hilary Vacation, 1842, reported in the *Jurist*, vol. 6, p. 368.

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covenant was controlled by the latter. In order to constitute a complete breach, it was necessary to shew that the plaintiff had not sown in conformity with all the stipulations in the covenant. The plea would have been bad on demurrer. [*Tindal*, C. J.—The plea contains a good statement of one breach, and a defective statement of another.] The latter part of the plea might, therefore, be treated as surplusage. The replication then took issue on all that was material in the plea, and was, consequently, good.

Channell, Serjt., in reply. In *Lord Crumwell's case* (*a*), the decision of the Court depended on the word "seised." That word could, in that case, only have the meaning that the party had an estate in fee. Besides, there the question arose on a plea of title. That depended on different principles. The report of the case of *Robinson* v. *Turner* (*b*), was not sufficiently full to ascertain what the precise issue raised between the parties was. It might be that the issue was specifically with respect to the individual John Thomas. If that were the case, the defendant was to blame for permitting himself to be so restricted in the issue. It was to prevent that difficulty that the defendant in the present case demurred. The covenant against having two crops of corn successively, was distinct from that part which referred to sowing with peas and beans. The first part of the tenth plea disclosed a complete breach, and the other part disclosed a portion of another. This latter part the plaintiff had no right to involve in the issue. If he were allowed to do so, he would impose on the defendant the necessity of proving what he never had any intention to allege. The plaintiff had no right, by his mode of pleading, to throw this difficulty on the defendant.

Cur. adv. vult.

(*a*) 3 Dyer, 365, b.

(*b*) The *Jurist*, vol. 6, p. 368.

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TINDAL, C. J., afterwards (*a*) delivered the judgment of the Court.—This was an action of trespass for breaking and entering a certain farm demised to the plaintiff by James Esdaile, to hold for twenty-one years, from Michaelmas, 1839; cutting and carrying away crops, &c.

The defendant pleaded several pleas, of which the seventh set out the lease granted by Esdaile to the plaintiff, which contained covenants by the plaintiff, that he would not at any time during the said term of twenty-one years, sow, crop, receive, or take off or from the said arable lands demised, or any part thereof, more than two crops of any sort of corn or grain successively; but should and would every third year, summer fallow or lay the said arable lands down with rye grass and clover seeds, in a husbandlike manner, or should or would plant with potatoes, or sow with peas or beans, which should be twice well hoed. And also that he the plaintiff, his executors, &c., should not nor would at any time during the said term of twenty-one years by the said indenture demised, let, set, demise, lease, assign, or set over, or otherwise part with that indenture, or the premises thereby demised, or any part thereof, to any person or persons whomsoever, without the special license and consent of the said James Esdaile, his heirs and assigns in writing; with a power of re-entry for breach of any covenant in the lease. This plea then set out a release of the reversion to defendant. The eighth plea, after referring to the lease granted to the plaintiff, and the release of the reversion to the defendant, averred, "that after the making of those several indentures, and before the said time, when, &c.," the plaintiff did set over and part with the said indenture of lease, and the term thereby created, and his the plaintiff's interest therein, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained; to wit, by pawning, pledging, and mortgaging the said indenture of lease, to

(*a*) In Trinity Vacation.

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and with certain creditors of him the plaintiff, to wit, one Robert Watson, and one Francis Broughton, without the special license and consent in writing of the said James Esdaile, or of the defendant. Lastly, the defendant pleaded, that during the said term of twenty-one years, the plaintiff did sow, receive, and take off and from divers, to wit, fifty acres of the arable lands demised, and off and from every part thereof, more than two crops of corn successively, to wit, three crops of wheat successively; and that the plaintiff did not nor would every third year, or at any other time, or in any other manner, summer fallow, or lay the said arable lands, or any part thereof, down with rye grass, &c., in a husbandlike or any other manner, nor did nor would plant with potatoes, nor sow with peas, which were twice, or at all, well, or in any other manner, hoed, &c.; wherefore defendant entered, &c. The plaintiff replied to the eighth plea, that he did not set over or part with the said indenture of lease, or the term thereby created, or his, the plaintiff's interest therein, within the true intent, &c., "by pawning, pledging, or mortgaging the said indenture of lease, to and with the said supposed creditors of him the plaintiff in that behalf mentioned, or either of them, in manner and form as in the eighth plea mentioned. To the last plea the plaintiff replied, that he did not at any time during the said term of twenty-one years, sow, crop, receive, or take off, or from the said arable lands, or any part thereof, any more than two crops of any sort of grain successively, and in every third year summer fallow a part, consisting of divers to wit, fifty acres of the said arable lands, and did lay down with rye grass, and clover seeds, in a husbandlike manner, part consisting of divers, to wit, fifty other acres of the said arable lands; and did plant another part, consisting of divers, to wit, fifty other acres of the said arable lands with potatoes; and did sow another part, consisting of divers, to wit, fifty other acres of the said arable lands, with peas, and divers, to wit, the residue of the said arable lands, consisting of fifty other acres with beans,

which were twice well hoed, &c. The defendant demurred to the replication to the eighth plea, on the ground that it ought to have denied generally, that the plaintiff had in any manner set over or parted with the indenture of lease, instead of confining the issue to the mode of parting with, as alleged under a videlicet in the plea. He demurred also to the replication to the tenth plea, on the ground that the plea did not attempt to raise any issue about the sowing of *beans*; whereas the plaintiff, by the replication sought to involve that question in the issue; and also that the replication did not shew that the potatoes and peas said to have been planted, were twice or in any manner so hoed.

After the case had been argued, it stood over that the parties might consider whether they would amend. As neither party has thought fit so to do, we must pronounce our judgment on the record in its present state—and we are of opinion, that on the demurrer to the replication to the eighth plea, the defendant must succeed. It is a general rule in pleading, that a traverse more large or more narrow than necessary is bad. *Com. Dig.* tit. "*Pleader*" (G. 15, and G. 16). As instances of traverses too large, he mentions the case cited at the Bar from *Yelverton*, 122, "A traverse of a surrender of a copyhold to such a steward such a day is bad; for the day and steward ought not to be part of the issue—but the traverse ought to be of the surrender, modo et formâ." And again, "So in trover, if the plaintiff alleges conversion by the sale of the goods, traverse of the conversion by sale is too large." The modern case of *Stubbs v. Lainson* (*a*), proceeded on the same principle. Several other cases are cited in Mr. Serjt. *Stephen's* work on Pleading, 5th Ed. p. 281, where the rule is very clearly laid down and explained, and in the next page he states and explains the rule on which the argument in support of this replication was founded, viz., that a party may in general traverse a *material* allegation of title or estate

(*a*) 1 M. & W. 728.

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to the extent to which it is alleged, though it need not have been alleged to that extent. It appears to us, however, that the allegation under the videlicet, that the indenture of lease was parted with by mortgaging it to Watson and Broughton, was not a material allegation of title, and that the plaintiff could not properly put it in issue by his traverse.

In deciding as to the replication to the tenth plea, it is necessary to see first what is the breach there alleged. The covenant set out is two-fold. That the tenant will *not* take more than two crops of grain in succession, and *will* do certain other things. The plea then avers correctly a breach of the first branch of the covenant, but does not shew a breach of the second; for it does not state that the tenant did not sow with beans, which was one mode in which he was allowed to perform that branch. The replication contains a direct traverse of the breach well alleged; and matter which would not have been a sufficient answer to a breach of the second branch of the covenant, if that had been shewn by the plea. But we are of opinion, that the averments in the plea following the first breach, are mere surplusage, for they do not amount to a defective statement of a breach of the second branch of the covenant; that which is stated is sufficiently stated—but that which is necessary to shew the second branch of the covenant broken is not stated at all. The replication therefore which answers the only material part of the last plea is good, notwithstanding the introduction of immaterial matter as an answer to immaterial matter in the plea. The judgment of the Court then must be for the defendant, on the demurrer to the replication to the eighth plea; and for the plaintiff on the demurrer to the replication to the last plea.

Judgment accordingly.

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ASSUMPSIT. The declaration was in the common form on two bills of exchange against the defendant as acceptor.

Second plea. That before the commencement of this suit, to wit, on the 27th day of October, in the year of our Lord, 1843, a petition for the protection of the defendant from process, was duly and according to the form of the statute in such case made, presented by the defendant to her Majesty's Court of Bankruptcy; and that afterwards and before the commencement of this suit (to wit), on the 20th day of December, in the year last aforesaid, a final order for protection and distribution was made in the matter of the said petition by Joshua Evans, Esq., then being a commissioner of the said Court of Bankruptcy; duly authorized in that behalf; and that the monies and causes of action in the declaration mentioned, and every of them, and every part thereof, were contracted before the date of filing the said petition. And this the defendant is ready to verify, &c.

Special demurrer, setting forth as grounds, that the plea does not state with sufficient particularity the presenting of the said petition for such protection as therein mentioned, nor how the defendant prayed to be protected, nor does it state or in any way shew whether the defendant was a trader or not; or if a trader, whether his debts amounted to less than 300*l.*; nor that the defendant had resided within the district of the London Courts of Bankruptcy, twelve months next before the presenting of the said petition, or next before the making the said order or otherwise; nor where he ever resided: that the said plea doth not allege, or in any way show that the defendant gave such notice as by the statute in such case made and provided is mentioned and required: that the proceedings upon the said petition until the giving of the said final order, and the said order of the said commissioner, should have been stated and set forth with greater minuteness and

A defendant who has obtained a final order for protection under 5 & 6 Vict. c. 116, s. 4, may, under sect. 10, plead generally his protection, without setting out all the facts required to exist in order to procure the order.

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particularity, and the Court thereby have been enabled to judge of its sufficiency: and that the said plea does not shew that the said order was for the protection of the defendant, or for the distribution of his effects. Joinder in demurrer.

Dowling, Serjt., in support of the demurrer. The plea was founded on the 5 & 6 Vict. c. 116. In order to shew that the defendant was entitled to the benefit of the provisions contained in that statute, it was necessary to shew that he came clearly within them. Various qualifications were requisite to bring a party within the meaning of that statute; but none of them were stated in this plea. According to sect. 1, the party must not be a trader, or if a trader, his debts must not amount to 300*l*. He must, moreover, have resided twelve calendar months within the bankrupt district, to the commissioner of which he presented his petition. None of these qualifications were stated in the plea. Again, it was requisite that the party seeking to avail himself of the act, should present a petition in a particular form, accompanied by a schedule required to contain certain particulars. No allegation was to be found in the plea equivalent to those required by the statute, unless the word "duly," could be held to have that effect. But the word "duly" in the plea, applied to the mode of presenting the petition. A petition might have been "duly" presented, and yet might not have been such a one as the statute contemplated, or accompanied by the required schedule. The defendant ought to have disclosed such a state of facts on the face of his plea as would enable the Court to judge, whether he were entitled to the protection provided by the statute. That the addition of the schedule was a material ingredient in the plea, was clear from the provision contained in sect. 4. By that section, it was provided, that in order to entitle the petitioner to the benefit of a final order of protection, the matters contained in the schedule must appear to be true, and that the debts of the petitioner were not of the excepted descriptions enumerated in the section.

These exceptions also ought to have been negatived. The case of *Leaf* v. *Robson* (*a*), was a direct authority that the plea was insufficient in point of form. There, the defendant had pleaded a similar plea to the present in a general form, and the Court intimated a strong opinion, that the defendant should have followed the terms of sect. 4 of the statute, and leave was given to amend. It might, perhaps, be contended in support of the plea, that the defendant was empowered by sect. 10, to plead in this general form; but the provisions of that section would, on examination, be found to contain no such general mode of pleading. The words of it were, "that if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order, signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." There was nothing here to authorize a general mode of pleading, and consequently the ordinary form in such cases must be adopted. It might be asked, with what object was sect. 10 introduced into the statute, unless it were for the purpose of authorizing a general mode of pleading. The object plainly was to enable the defendant to avail himself of his protection. Unless the provisions of sect. 10 were introduced, the petitioner would still remain liable to be sued in respect of his debts; but those provisions by no means interfered with the form of pleading his protection. As nothing was provided as to the form of the pleading, it must be presumed that the Legislature intended the ordinary mode of pleading to continue. If the language of section 10 were compared with that of 6 Geo. 4, c. 16, s. 126, which did authorize a general form of pleading, it would be found very different

(*a*) *Ante*, vol. 2, p. 646; S. C. 13 M. & W. 651.

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from the latter section. The provision there was, that a defendant "may plead in general that the cause of action accrued before he became bankrupt." Again, in 7 Geo. 4, c. 57, s. 61, it was enacted, that it shall be lawful for the petitioner "to plead generally, that such person was duly discharged according to this act, by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially." It must be presumed, that, as the Legislature shewed when it was intended to make an alteration in the mode of pleading, that it was capable of using apt words for that purpose; so, when no such words were used, no change in the mode of pleading was intended.

Channell, Serjt., contrà. The plea was good in point of form. By section 1, it was provided, that certain persons, on complying with certain conditions, might have their claim to protection adjudicated upon. Then, by section 4, the commissioner is to determine whether the petitioner has duly complied with the provisions of the statute, and, if he have, to give him his final order for protection. The question, therefore, whether the petitioner had complied with what the statute required, was left to the decision of the commissioner. Then with regard to the excepted cases in the section. It was not necessary that the defendant should by his plea shew that he did not come within them. If the plaintiff intended to object that the defendant was not protected on account of his case coming within some one of the exceptions, he might reply the facts. The main question was, however, whether section 10 authorized the present general form of pleading? The language of it certainly was not so precise or express as that of the 6 Geo. 4, c. 16, s. 126, or that of the 7 Geo. 4, c. 57, s. 61; but on examining the terms employed, it would appear that the same object was intended to be attained by the Legislature. If that were so, then the allegation that the petition had been "duly" presented, must import that

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the requisites of the statute had been pursued. [*Maule*, J. —The plea contains no allegation that the petition was presented in the prescribed form.] The word "duly" includes that allegation. There is no provision in the section, that the plea shall contain such a statement, unless the word "duly" can be held to import it; and if it do, then that word inserted in the plea must imply it. The present case was clearly distinguishable from that of *Leaf* v. *Robson* (*a*). No doubt if a party pleading has an option as to whether he will adopt a special or a general form of pleading, if he adopt the former, he must set out all such facts as will render his plea a good one. He is of course not bound to avail himself of the general form of pleading. If, therefore, in *Leaf* v. *Robson*, the defendant adopted the special mode of pleading the facts on which his defence was founded, he was bound to set them all out so as to shew that he came within the provisions of the statute. But the plea in that case was clearly bad, on a ground which under section 10 would be available. It did not aver that the debt accrued before the petition; and it would appear that the real ground on which the Court proceeded, was that it did not allege the petition, in the words of the section, to have been duly presented; but no decision was actually pronounced on the main question. There are, however, cases in which the Court of Exchequer has intimated an opinion that the general form of pleading was not authorized by section 10; but that Court has, on no occasion actually decided the point (*b*).

Dowling, Serjt., in reply. If an act of Parliament created an offence, it was well established as a rule of pleading, that the words of the statute merely could not be used, but the particulars constituting the offence must be stated. [*Maule*, J.—That would be a very inconvenient rule to apply in the present case, for then the plaintiff might con-

(*a*) *Ante*, vol. 2, p. 646; S. C. 13 M. & W. 651.
(*b*) See *Fisher* v. *Gibbon*, *ante*, vol. 2, p. 869.

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trovert every fact which was alleged in the plea, in compliance with the provisions of section 1, and then the defendant would have to try the question over again as to every debt, after it had undergone the commissioner's investigation. *Tindal*, C. J.—If the defendant is bound to introduce these suggested allegations into his plea, he must prove them. If so, then what effect is given to the latter part of the clause, which provides, that the order of the commissioner shall be sufficient evidence? If the plaintiff will not be allowed to controvert them, to what purpose should they be alleged in the plea?] The question as to what evidence would support particular allegations, can hardly determine that those allegations should not be introduced into a pleading.

Cur. adv. vult.

TINDAL, C. J.—When the question arising on this record was argued before us, we were informed that the Court of Exchequer had recently pronounced judgment on the very point in a case of *Bendle* v. *Snelling* (*a*). We have made inquiry respecting that case, and find that the same point was raised there as in the present case; but the Court having intimated an opinion that the plea was bad, the defendant's counsel, without arguing the question, asked leave to amend; and consequently that case cannot be considered as a decision on the point. It appears to us, that the 10th section of the 5 & 6 Vict. c. 116, does give the right to plead generally in the manner adopted by the defendant in this case. Power is given to the commissioner by the earlier sections of the act to inquire into the matters of the petition, and adjudicate upon them, and make a final order for protection and distribution if he think fit so to do; and it seems to us that it was the intention of the Legislature to make his decision final, and not capable of being controverted in an action; especially, as by the 12th section, any creditor or assignee is enabled to petition the commis-

(*a*) Not reported.

sioner to rescind his final order, "as far as relates to the protection of the petitioner's person from process, and as far as relates to the effect of such order in bar of suits and actions." If then the decision of the commissioner as to the matters authorizing the making of a final order is not to be controverted, there can be no good reason for requiring the plea to set forth all the facts necessary to give him jurisdiction; and it is reasonable to allow, under the section in question, the same form of plea, as is given in somewhat more express terms, by the Bankrupt Act, 6 Geo. 4, c. 116, s. 126. The words there used are, that the bankrupt having obtained his certificate, "may plead *in general* that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence, and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate." The section now in question enacts, that "it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, *whereof* the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." Although these two sections are not identical in terms, we think that the plea now under consideration contains all that the latter statute requires, in order to constitute a sufficient plea in bar of the suit. Our judgment, therefore, must be for the defendant.

Judgment for the Defendant (*a*).

(*a*) See *Nichols* v. *Payne*, *ante*, vol. 2, p. 629; S. C. 8 Scott. N. R. 732.

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SC. 1. CB. 737.

WILKES *v.* HOPKINS and Others.

If an order to admit a bill of exchange is made, where the notice describes it as having been "accepted by one H. B. for the defendants;" it is not competent to the defendants to dispute the authority of H. B. to accept as their agent.

ASSUMPSIT on a bill of exchange by the drawer against the acceptors. The declaration described the bill as drawn on and accepted by the defendants for 121*l.* 10*s.*, payable at Messrs. Jones, Loyd, and Co.'s. The defendant Hopkins pleaded, in addition to other pleas, that he did not accept in manner and form. The usual summons to admit, accompanied by a notice, was served in pursuance of Reg. Gen. H. T., 4 Wm. 4, part I. r. 20. In the notice the bill was described as "a bill of exchange drawn for the sum of 121*l.* 10*s.* by the plaintiff upon, and directed to the above defendants as the Newbridge Coal Company, Forest of Dean, Gloucestershire, and accepted by one Henry Bishop for the defendants, as the Newbridge Coal Company, payable at Messrs. Jones, Loyd, and Co., bankers, London, payable two months after date, and indorsed by the plaintiff and William Russell Skey for the Gloucestershire Banking Company, dated 20th June, 1835." An order by consent was made to admit this bill.

The cause was tried at the Gloucester Summer Assizes, 1844, before *Tindal*, C. J. The plaintiff put in the order, with the notice attached, in support of the count on the bill. It was objected on the part of the defendant Hopkins, that in order to render it evidence in support of the bill, it was requisite that the authority of Henry Bishop to accept the bill should be shewn, and that of itself it was not sufficient for the object proposed. The Chief Justice, however, was of opinion that the notice and order were sufficient, as the effect of the admission was to conclude the defendant from disputing the authority. The plaintiff accordingly recovered.

Byles, Serjt., obtained a rule nisi for a new trial, both on the ground that the Chief Justice was incorrect in his ruling, and on an affidavit stating that the attorney of the defendant Hopkins was not aware of the effect of the admission.

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Talfourd, Serjt., and *Channell*, Serjt., shewed cause against this rule. If the defendant could escape from the consequences of the admission contained in the order referring to the notice, the object of the rule would in most instances be completely frustrated. The notice described the bill as drawn on the defendants, and as accepted by a certain person in the character of their agent. These statements the defendants admitted to be true. If that were so, the defendants did admit the agency of the person described as agent. It could not be successfully contended that the defendants only admitted the handwriting of the person described as agent. Such an admission would operate as a surprise upon the plaintiff. In the case of a deed being admitted in the manner required by the rule, it could hardly be said that the identity of the party executing it was not admitted. If so, the admission would be entirely useless. So in the present case, to what purpose would the admission be that the bill had been accepted by the person named in the notice, who was described as the agent of the defendants, unless the agency were admitted as well as the signature. It could not be said that this construction wrought any hardship on the party making the admission, as it was always in his power to restrict it to such matters as he thought proper. The present rule ought, therefore, to be discharged.

Byles, Serjt., in support of the rule. The rule of Hilary Term, 4 Wm. 4, part I. r. 20, was made in pursuance of the 3 & 4 Wm. 4, c. 42, s. 15. The language both of the statute and the rule shewed that the object of the Legislature and of the Judges who framed the rule was to facilitate the proof of matters which would be apparent on the mere inspection of documents, and not of matters not so apparent. It was clearly intended that the mere formal proof of handwriting should be thus facilitated. The words of the notice of admission that it should be made, "saving all just exceptions to their admissibility," would lead to this conclusion.

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It would be harsh to put any other construction on the rule, seeing that admissions so made were irrevocable, and would be available even in the case of a second trial; *Doe* d. *Wetherell* v. *Bird* (*a*); *Langley* v. *The Earl of Oxford* (*b*); *Elton* v. *Larkins* (*c*). The only object of the admission was to identify the parties, and therefore all that the defendants had here done was to admit the signature by Bishop of a document purporting to have a particular effect. The question as to the authority of Bishop to bind the defendants must still remain open. In the case of a will, the execution of which was admitted under the rule, it would scarcely be contended that the sanity of the testator was conclusively admitted so as to prevent the party making the admission from raising that question. It never could have been the intention of the Legislature to compel parties under the penalty of costs to make such an admission. [*Erle*, J.—In the case of a letter from defendant's attorney, would it be necessary, when it had been admitted in the usual form, to be prepared with proof that the person from whom the letter came was acting in that capacity? One of the instances to be found in the form is "memorandum of agreement between C. D., captain of said ship, and E. F." Is it contended that it would be requisite, after an admission made with reference to such a notice, to produce proof of C. D. being captain?]

Cur. adv. vult.

TINDAL, C. J.—This was an action upon a bill of exchange, drawn by the plaintiff "on the Newbridge Coal Company, Forest of Dean, Gloucestershire," and accepted "at Messrs. Jones, Loyd, and Co., for the Newbridge Coal Company, by Henry Bishop." The defendants pleaded, amongst other pleas, that they did not accept; and at the trial before me, at the last Summer Assizes for the county of Gloucester, it was objected on the part of the defendants,

(*a*) 7 C. & P. 6.
(*b*) 1 M. & W. 508.
(*c*) 1 M. & Rob. 196. See S. C. 5 C. & P. 385.

that there was no evidence that Henry Bishop, who had signed the acceptance, had any authority to accept for them. On the part of the plaintiff, however, it was contended, that by the admission entered into by the defendants, they were precluded from taking this objection; which appeared to me to be the case. And the question which has been argued before us on a motion for a new trial has been, whether the bill of exchange was properly admitted in evidence.

The admission was given under a Judge's order, drawn up in the usual form under the general rule of Hilary Term, 4 Wm. 4, part I. r. 20. And the argument on the part of the defendants before us has been, that admissions given under such an order, do by the very language of the order, bind the party to admit at the trial no more than that the documents therein specified to be originals, are written, signed and executed, "as they purport respectively to have been;" and that as the bill of exchange when produced, purports to be drawn by the plaintiff on the Newbridge Coal Company, and to be accepted for the Newbridge Coal Company by Henry Bishop; so nothing more is admitted, than that the acceptance for the Newbridge Coal Company is in the handwriting of Henry Bishop: but, that there is neither an admission that the defendants are the persons who constitute the Newbridge Coal Company, nor that Henry Bishop had any authority from them to accept bills on their behalf.

How far this might have been the case, if the bill had been set out in the notice to admit, in the precise terms in which it purports to have been drawn; that is, if it had been described as a bill drawn on the Newbridge Coal Company, and accepted for the Newbridge Coal Company by Henry Bishop; we are not called upon to determine. For in this case, the bill is described in the notice to admit, as a bill "drawn upon and directed to the above-named defendants, as the Newbridge Coal Company," and "accepted by one Henry Bishop, for the defendants, as the Newbridge Coal Company, payable at

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Messrs. Jones, Loyd and Co., bankers, London." So that the facts, that the defendants constitute the Newbridge Coal Company, that the bill is accepted by Henry Bishop, for the defendants, and that it is payable at a London banker's —these facts not appearing on the face of the bill, are plainly and unequivocally admitted under this notice. A defendant undoubtedly may, if he think proper, bind himself by the form of his admission more largely than he would be called upon to do, under an ordinary notice to admit; and this we think the defendants have done upon the present occasion; and that it would be giving them an unfair advantage, after an admission in these terms, which imports in its natural and ordinary sense, that Bishop had authority to accept for the defendants, if they should be allowed at the trial to set up the want of such authority.

As, however, we see reason to believe from the affidavits, that the defendants were themselves taken by surprise by the extent to which their admission has been carried; and as they allege themselves to have been prevented thereby from entering into their real defence at the trial; we think it reasonable that there should be an opportunity afforded of new modelling their admission, and that a new trial should be granted on payment of costs by the defendants.

Rule absolute accordingly (*a*).

(*a*) See *Waite*, executor, &c., v. *Gale*, *ante*, vol. 2, p. 925.

SC. 1 CB 746

DAVIES *v.* ASTON, Knight.

Trover for hay, corn, carts, horses, &c.; tables, carpets, chairs, &c. Plea justifying the taking of the goods under a distress for rent. Replication, that the goods were beasts of the plough and implements of husbandry, and that there was other available distress: *Held*, on special demurrer, that the Court would take notice that several of the articles enumerated in the declaration could not possibly be beasts of the plough or implements of husbandry: and that the replication was therefore ill.

CASE for an excessive and illegal distress, with a count in trover for hay, corn, carts, horses, cows, bulls, heifers, stirks, calves, tables, carpets, chairs, &c., (enumerating various other articles of furniture and of husbandry).

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Plea to the count in trover, that the goods in question were taken under a distress for rent.

Replication to that plea, that plaintiff was a husbandman, and carried on and exercised the business and calling of husbandry, and that the said goods and chattels in the said last count mentioned, were the cattle and beasts of the plough and the implements of husbandry of the said plaintiff, by him then used in and upon the said last mentioned lands, tenements, and premises, in and about his said business and calling, and wherewith respectively he gained, tilled, and cultivated the said lands, tenements, and premises in the last plea mentioned. The replication then went on to aver, that there was a sufficient available distress on the premises besides the goods taken.

Special demurrer to the replication, on the ground that there is not in the replication any introductory allegation that it is pleaded to any particular part only of the plea, or in support of any particular part only of the said sixth count; but it professes to be an answer to the whole plea: whereas some of the goods in the count and plea mentioned, are such as cannot by possibility be beasts of the plough, or implements of husbandry, to which the replication should, therefore, have been expressly confined.

Joinder in demurrer.

Sir *Thomas Wilde*, Serjt., (with whom was *Welsby*), in support of the demurrer. The replication should have been confined to such part of the plea as justified the taking of the beasts of the plough and implements of husbandry. But as it does not do so, it is no answer to the plea which justifies taking other as well as privileged articles by virtue of a distress.

Talfourd, Serjt., contrà. The Court will not of itself take notice, that some of the articles mentioned in the declaration, are not beasts of the plough or implements of husbandry, and, therefore, are not privileged as such from

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distress. Here the declaration would have been supported, if the plaintiff could have shewn that some only of the articles were taken; and the effect of the replication ought not to be to circumscribe his right.

TINDAL, C. J.—We think that the replication is bad, as professing to answer the whole of the plea, which it does not do; and that we must take notice that some of the articles mentioned in the declaration, cannot possibly be beasts of the plough or implements of husbandry.

PER CURIAM.

Judgment for Defendant.

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1 C. C. 1 CB - 815.

NEEDHAM v. FRASER.

A declaration against a witness for not attending a trial pursuant to a subpœna, alleged that the plaintiff had a good cause of action in that suit, and that the testimony of the defendant was material evidence for the plaintiff. Pleas; first, not guilty; secondly, that plaintiff could have proceeded to trial without the testimony of the defendant. Evidence was tendered on the part of the defendant at the trial, for the purpose of shewing that the plaintiff had not a cause of action in the original suit: *Held*, that as the defendant had not traversed the allegations that the plaintiff had a good cause of action, and that the evidence was material, those allegations were admitted; and that he was consequently estopped from giving the evidence tendered.

CASE against the defendant for not attending as a witness at nisi prius in pursuance of a subpœna.

The declaration recited an action on the case in this Court, brought by the now plaintiff against one D., as also a writ of subpœna ad testificandum, directed to the now defendant, to give evidence in that action on the part of the plaintiff; it then alleged, that the plaintiff afterwards, and before the committing the grievances, &c., to wit, on, &c., caused to be made known and shewn to the now defendant the said writ, and then caused a copy to be left with the now defendant, and then paid to the now defendant a certain sum of money, to wit, &c., being a reasonable sum of money for his costs and charges in and about his attendance as a witness, according to the tenor of the said writ of subpœna. That the said action came and

11 · CB - 398.

was called on to be tried at the said time, to wit, on, &c., and at the place respectively mentioned in the said writ of subpœna for that purpose; and that he the said plaintiff had a good cause of action in the said action; and although the defendant could and might, in obedience to the said writ of subpœna, have appeared at the trial of the issue in the said action, when the same was so called and came on to be tried as aforesaid, and could and might, in obedience to the said writ of subpœna, have testified the truth, according to his knowledge, at the time and place aforesaid, at the said trial of the said issue, and although his testimony of the truth, according to his knowledge, was material evidence for the now plaintiff at the trial of the said action, whereof the defendant then had notice; yet the defendant, not regarding his duty in that behalf, but contriving, &c., did not, nor would, appear as a witness at the time and place respectively mentioned in the said writ of subpœna in that behalf, at the trial of the said issue in the said action, when the same was so called and came on to be tried as aforesaid, although he the defendant was then and there solemnly called upon for that purpose, and had no reasonable or lawful cause or impediment to the contrary, but the defendant thereupon wholly neglected so to do; by reason whereof, and because the said plaintiff could not proceed to the trial of the said issue without the testimony of the now defendant, he the plaintiff was then, to wit, on, &c., forced and obliged to withdraw, and did then withdraw, the nisi prius record of the said issue; by means of which said several premises, he the plaintiff then became, and was made liable to pay to the said D., a large sum of money, to wit, &c., for the costs incurred by the said D., by reason of the said record being so withdrawn as aforesaid, and by reason of the said issue not being tried at the time and place aforesaid, and otherwise by reason of the premises; and the now plaintiff also lost and was deprived of the value and benefit of a large sum of money, to wit, &c., which he had paid and expended in order to have the said issue tried at the time and place aforesaid; and the

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plaintiff was also obliged to expend, and did necessarily expend, divers other sums of money, in the whole amounting to a large sum of money, to wit, &c., in and about prosecuting the said suit, and the plaintiff was damnified by the means of the premises, and otherwise greatly injured, to the plaintiff's damage, &c. The defendant pleaded, first, not guilty; secondly, leave and license; and, thirdly, that the plaintiff could have proceeded to the trial of the said issue without the testimony of the defendant, concluding to the country.

At the trial before Lord *Denman*, C. J., at the last Surrey Spring Assizes, the plaintiff put in evidence the record in the action against D., and then proceeded to shew, that it had been withdrawn in consequence of the now defendant being absent. On the part of the defendant it was contended, that on inspection of the record in the action against D., it would appear that the plaintiff had no cause of action in the original cause, and, consequently, that he could not be said to have been damnified by the non-attendance of the defendant. The defendant then tendered the record in the action against D., as evidence to shew, that the plaintiff had no cause of action against D., and proposed also to adduce in evidence a certain affidavit to which reference was made in the declaration in that action, for the same purpose. Lord *Denman*, however, was of opinion, that the evidence tendered was inadmissible on the pleadings in the cause, as they stood, and directed the jury to find a verdict for the amount of the costs to which the plaintiff had been put on taking the cause down to trial, and those to which he had become liable in consequence of the defendant's absence at the former trial, the amount to be settled by the Master, with leave to the defendant to move to enter a nonsuit, or in the alternative for a new trial.

A rule nisi having accordingly been obtained,

Shee, Serjt., shewed cause. By the mode in which the defendant pleaded, he in fact admitted "that the plaintiff had a good cause of action in the said action" against D.,

and also that the testimony of the defendant "was material evidence for the plaintiff at the trial of the said action." Being so admitted, it was not competent for the defendant to adduce evidence for the purpose of contradicting the admissions on the record. If it should be contended, that these allegations in the declaration were not material for the purpose of supporting the plaintiff's action; then the evidence tendered was inadmissible, because the object of it was to contradict what was immaterial. With respect to the damages which the plaintiff claimed. The plaintiff had been prevented from exercising a right which he possessed, and the law would intend, that that interference with his right had been productive of some damage. That damage must be the amount of costs, which had been uselessly expended in consequence of the defendant not attending in pursuance of the subpœna. He would, moreover, be entitled to recover those costs, for which he had become liable to the defendant as the costs of the day. The defendant would certainly be liable to this extent, although he might not be liable to substantial damages in respect of the breach of duty committed by him. The present rule must, therefore, be discharged.

Channell, Serjt. (*Bramwell* with him), appeared to support the rule. In order to sustain the plaintiff's action, the allegation "that the plaintiff had a good cause of action in the said action," was not necessary. That allegation being immaterial as being unnecessary, not traversing it did not operate as an admission. The plaintiff might have cause to complain, that the defendant had not attended at the trial, and yet he might have had no good cause of action. It might happen that he would be entitled to the costs of certain issues raised on special pleas, although he might fail upon the general question as to his right of action. As in *Hart* v. *Cutbush* (*a*), where it was

(*a*) 2 Dowl. 456.

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held, that if a defendant pleads the general issue, and several special pleas, and the jury finds for him on the general issue, and for the plaintiff on the special pleas, the plaintiff is entitled to the costs of the pleadings and witnesses on those pleas. So in the first case, the plaintiff might be entitled to the costs of other pleadings in the cause, although the finding of the jury might shew that the plaintiff had no cause of action. From obtaining these costs, the defendant's non-attendance might have prevented him. It was, therefore, not necessarily admitted that the plaintiff had a good cause of action in the prior suit. But to sustain the plaintiff's declaration, it was necessary, that he should shew that he had suffered damage from the supposed wrongful act of the defendant. If so, it must be competent for the defendant to adduce evidence for the purpose of shewing, that if the plaintiff had gone on to trial, he could not have obtained a verdict. If he could not have obtained a verdict, then the defendant would have done nothing productive of damage to the plaintiff. It might be that withdrawing the record was a beneficial course for the plaintiff to pursue, if it appeared that the plaintiff would have failed. It might be that he would never put the cause down again. There was nothing to shew that the plaintiff would have to pay the defendant's costs in the original action. The defendant had not yet moved for those costs, nor had any been taxed. Then with respect to the affidavits which were proposed to be given in evidence, for the purpose of shewing that the plaintiff had no good cause of action in the original suit. They, as well as the record in the original suit, were admissible for the purpose of shewing that the plaintiff's action could not be sustained. [*Cresswell*, J.—If you struck out the averment "that the plaintiff had a good cause of action in the said action," would there be enough left to make this a good declaration?] There would be on the authority of the case of *Hart* v. *Cutbush* (*a*) already cited. Several other cases might be cited for this proposition. In

(*a*) 2 Dowl. 456.

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Amey v. *Long* (*a*), *Masterman* v. *Judson* (*b*), *Davis* v. *Lovell* (*c*), *Mullett* v. *Hunt* (*d*), there was no allegation that the plaintiff had a good cause of action, but merely an averment that the evidence of the witness was material to the issue. [*Maule*, J.—The declaration here contains both averments; may you elect which is to be struck out?] Yes. Perhaps it could not be successfully contended, that the plaintiff might sustain his action without either of the averments. Then the third plea did substantially traverse the second averment, as it alleged, that the plaintiff could have proceeded to the trial of the said issue, without the testimony of the defendant. Had the defendant traversed the allegation, that the plaintiff had a good cause of action, the plea would have been open to a demurrer, on the ground that it sought to put an immaterial allegation in issue. The declaration in the former action would be bad in arrest of judgment, as disclosing no cause of action on the part of the plaintiff. [*Maule*, J.—Conceding that no cause of action is disclosed on the face of the declaration, and that the plaintiff's judgment would, consequently, be arrested, then he would have to pay no costs to the defendant in that action; but now, in consequence of the defendant's breach of duty in not attending pursuant to the subpœna, he has to pay the costs of the day.] The plaintiff on the motion in arrest of judgment, must have paid his own costs, and nothing at present appeared to shew that any application had been made by the defendant in this action for the costs of the day. [*Cresswell*, J.—Is not the liability to pay those costs a sufficient damnification?] Perhaps so. Then as to the costs of setting the cause down a second time. Nothing was shewn to prove that the defendant had moved for judgment as in a case of nonsuit, and, therefore, it did not appear that the plaintiff would ever be required to set down this cause a second time.

(*a*) 9 East, 473.
(*b*) 8 Bing. 224; See S. C. 1 M. & Scott, 367.
(*c*) 4 M. & W. 678; See S. C. 7 Dowl. 178.
(*d*) 1 Cr. & M. 752.

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COLTMAN, J. (*a*)—I think that it is impossible to hold otherwise, than that the allegations in the declaration, that the plaintiff had a good cause of action in the said action, and that the evidence of the defendant was material, have been admitted by the pleadings. The consequence is, that the plaintiff is entitled to maintain this action. The defendant endeavoured at the trial to put in the affidavit, for the purpose of shewing that the plaintiff had in the original suit no good cause of action; but I am of opinion, that such evidence was not admissible to contradict what, on the record, has been admitted. Then, it was said, that, if this evidence was not admissible, yet at any rate the defendant might look at the record in the original action produced by the plaintiff himself, and that when looked at, it was evident on the face of it that the judgment would be liable to be arrested. Probably, there is little doubt that the declaration in that action was insufficient, and that the judgment would have been liable to be arrested; still a party is not entitled, therefore, to raise such a question, when there is an admission by his plea, that the plaintiff had a good cause of action in that suit. If there had appeared any inconsistency in the record itself, it might have been otherwise; but this evidence is offered only as any other evidence in the cause, and it seeks to shew that an allegation which has been admitted on the record is not true. This cannot be done; therefore, in my opinion, the plaintiff is entitled to recover the amount of the costs he has been put to, and also the costs he became liable to pay in consequence of the defendant's absence. The rule must, therefore, be discharged, and the costs be taxed on this principle.

MAULE, J.—I am of the same opinion. This declaration, which is in an action against a witness for not attending in obedience to a subpœna, states, that the

(*a*) *Tindal*, C. J., was absent.

plaintiff had a good cause of action in the said action, in which the defendant was required to give evidence: it also states, that the testimony of the defendant was material evidence for the plaintiff, and that by reason of the defendant's absence, the plaintiff was obliged to withdraw the record, and has in consequence incurred a liability to pay costs to the other side, as well as to pay his own costs of the day. The question is, whether the plaintiff can maintain this action for any of these costs. The declaration contains, in effect, two causes of action; one is, that the plaintiff has lost the benefit of the testimony of the defendant in sustaining a good cause of action, which the plaintiff had in an action against a third party; and the other is, that the plaintiff has lost the testimony of the defendant, which was material evidence for the plaintiff. The question is, if these two have been admitted on this record; and I think that they have been just as much admitted as if the declaration had stated, that the plaintiff had a good cause of action on a bill of exchange, and for goods sold and delivered, and the pleas had admitted that he had a good cause of action. In such a case, the defendant could not be allowed to negative the plaintiff having a cause of action. Cases have been cited in which these two causes of action have been held equivalent. Supposing that were so, still, whether one may be substituted for the other or not, is of no consequence, as one of them at least must be taken to be admitted on these pleadings. Then, although the plaintiff put in a document, which might shew something, from which it might be inferred that the plaintiff had no good cause of action; yet I am of opinion, that the defendant was not at liberty to ask the jury to draw such inference, he having admitted that the plaintiff had a cause of action by his not traversing that allegation. It is quite clear, that the defendant cannot prove what is inconsistent with his own admission. But it is said, that, as the plaintiff was obliged to put in evidence the record, in order to shew that there was such a record, a different rule should prevail

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from that which exists where the defendant himself produces the evidence; but I think that this does not at all alter the rule: and the effect of allowing such question to be tried by the jury, would be to try a matter already admitted, and, therefore, not in dispute between the parties. I think, therefore, that the plaintiff was entitled to recover the costs he had been put to, and also those which he had become liable to pay to the defendant in the original action.

CRESSWELL, J.—I am of the same opinion. The first point made was, that, unless the plaintiff had a good cause of action in the former action, he was not entitled to recover against the witness; and my Brother *Channell* has contended, that it has not been shewn that the plaintiff had such good cause of action, because the averment in this declaration, that the plaintiff had a good cause of action, was not material to support this declaration, and, therefore, was not admitted; and many cases have been cited to the effect that a declaration has been held good without such averment; but those were cases where the question arose after verdict, and there were in them averments which were equivalent. It may be possible to frame a good declaration without averring that the plaintiff had a good cause of action; it might shew that there were various issues, and that the evidence of the witness was material for some of them, and that the plaintiff had sustained damage in consequence of the absence of such witness. When, however, it rests on an averment that the plaintiff had a good cause of action, surely that averment is a material one; and if the declaration disclose two grounds of action, and both, as here, are admitted; one of them, at any rate, must be admitted. Then, as to receiving in evidence the former record; it is admitted by the defendant on this record, that the plaintiff had a good ground of action in the former action. But then, although the former record was evidence for the purpose for which it was received, namely, to shew that there was such a record

in existence, yet it was not evidence to contradict what is admitted on this record, namely, that the plaintiff had a good cause of action. I therefore think that this rule must be discharged, and that the measure of damages the plaintiff will be entitled to, is the costs which have been wasted by the defendant's culpable absence.

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Rule discharged.

SHEPHERD *v.* SHEPHERD.

SC – 1 CB. 849.

DEBT on a promissory note. The declaration stated, that the defendant on the 25th of March, 1844, made his promissory note in writing, and thereby promised to pay the plaintiff or his order, 690*l.* on the 25th of March, 1845, which day had expired before the commencement of this suit, and then delivered the said note to the plaintiff; and thereupon the defendant then agreed to pay the amount of the said note to the plaintiff on request; whereby and by reason of the non-payment of the said sum of money, an action has accrued to the plaintiff, to demand and have of and from the defendant, the said sum of money. Yet the defendant has not paid the said sum or any part thereof, to the plaintiff's damage of 10*l.*, &c. To this declaration, the defendant specially demurred, and assigned for causes of demurrer, that the declaration is double and inconsistent in this, to wit, that in one part it states and alleges an agreement to pay the sum of 690*l.* on the 25th March, 1845, and in another part, that the defendant agreed to pay the said sum on request; and also, for that it is uncertain whether the plaintiff intends to rely on an express or an implied agreement; and if on the latter, that there is no sufficient consideration stated for such agreement.

In an action of debt on a promissory note, the declaration stated that the defendant promised to pay the plaintiff or his order 690*l.*, on a day not laid under *a videlicet*, and thereupon the defendant agreed to pay the amount of the said note to the plaintiff on request: *Held*, not double; and that it sufficiently appeared by reference to the commencement of the action, that the note had become due, without the usual allegation, "which period has now elapsed."

Byles, Serjt., in support of the demurrer. The declaration in this case did not disclose that any debt had accrued

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to the plaintiff. On general demurrer therefore, it was bad. According to the law merchant, days of grace were allowed for the payment of a promissory note, but no allegation was to be found in this declaration, that the days of grace had expired before the commencement of the suit, but merely that the 25th of March, 1845, on which day the note became payable, had expired. The case might have been different if the declaration had alleged which "period," according to the usual form, had expired: *Abbott* v. *Aslett* (*a*). [*Maule*, J.—In the case cited, *Parke*, B., observes, in speaking of the old mode of declaring on bills of exchange, "if the date of the bill was stated with certainty, it was sufficient to shew that it was payable a certain time after the date; but if the day were laid under a *videlicet*, it was necessary to allege that the time for payment had elapsed before the commencement of the suit, or the exhibiting of the bill." So in this case, the date is not laid under a videlicet, and therefore it appears when the note was due. Then if the Court can see from the date of the writ, that the action was not brought till afterwards, that is sufficient]. The date of the writ does not appear by the declaration. [*Tindal*, C. J.—All the proceedings in the action are presumed to be before the Court. The writ is part of those proceedings, and the date of it is therefore presumed to be before the Court]. The declaration then is bad for duplicity. In *Slade* v. *Drake* (*b*), the Court said, "pleading is not talking; and therefore it is required that pleading be true, that is the goodness and virtue of pleading; and that it be certain and single, and that is the beauty and grace of pleading. Therefore the law refuseth double pleading, and negative pregnant, though they be true, because they do inveigle, and not settle the judgment upon one point." Now the fact that one of two matters was ill-pleaded did not prevent the pleading being double; *Purssord* v. *Peek* (*c*); *Stevens* v. *Underwood* (*d*). This de-

(*a*) 1 M. & W. 209; See S. C. 4 Dowl. 759.
(*b*) Hob. 2 95.
(*c*) 9 M. & W. 196.
(*d*) 4 Bing. N. C. 655; See S. C. 6 Scott, 402; 6 Dowl. 737.

claration contained substantially two causes of action; the one consisting of the promise to pay on the 25th of March, the other to pay on request. [*Maule*, J.—The allegation, "The defendant then agreed to pay the amount of the said note to the plaintiff on request," is immaterial, and may therefore be struck out. It is not the promise which the promissory note would sustain, and consequently is merely nonsense]. But the word "thereupon," might be considered as equivalent to "afterwards." If so, the allegation would mean that the promise to pay on request had been made after the note became due. Sufficient would then appear to sustain a count on an account stated.

Dowling, Serjt., (*Bramwell* with him), contrà, was stopped by the Court.

TINDAL, C. J.—I think that the declaration is sufficient, notwithstanding the grounds of special demurrer. The allegation in the declaration is, that, on a particular day, namely, the 25th of March, 1844, the defendant made his promissory note in writing, and also that he thereby promised to pay on the 25th of March, 1845, which day is not laid under a videlicet, the sum mentioned in the note. The declaration then goes on to say, "which day had expired before the commencement of this suit;" but that was quite unnecessary, because we can see by the writ, that the suit was commenced after the note was due; therefore, that allegation may be struck out. It then goes on to say that the defendant "then delivered the said note;" this also was surplusage, and not required. What, then, is the effect, if, after the day has expired when the note was required to be paid, the defendant should promise to pay, when requested, that which he was before liable to pay? The declaration states only what was the legal effect of the defendant's liability. It is said that it amounts to duplicity, and that either part would afford a cause of action. There is, however, nothing to show that the rule in this respect as to

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pleas extends to declarations. I am, therefore, of opinion, that judgment should be for the plaintiff.

COLTMAN, J.—I am of the same opinion. The allegation in the declaration, that the defendant then agreed to pay the amount of the note to the plaintiff on request, as I understand it, refers to an agreement made on the 25th March, 1844. That was a void promise altogether; and, therefore, such allegation is no more than surplusage, and if the same be struck out, a good cause of action remains. I am not aware that the insertion in a declaration of a promise, which in law has no operation, will make the declaration bad.

MAULE, J.—It is said that this declaration is double, and cases have been cited, of *Purssord* v. *Peek* (*a*), and *Stevens* v. *Underwood* (*b*), in which pleas have been held double, though ill pleaded. But the sense in which a plea may be bad, on the ground of its being double, is not the sense in which a declaration is bad for duplicity. A plea is bad if it give two substantial answers to the antecedent pleading; but a declaration is not in like manner bad for stating two causes of action. The declaration may disclose several causes of action, as on two bonds or for two breaches of covenant, without being bad for duplicity; yet, if these were each to amount to a defence, or answer to an antecedent pleading, and were inserted in one plea or replication, such plea or replication would be bad for duplicity. A declaration may be bad, when, instead of containing in it two distinct causes of action, it states two causes of action for the same claim. Thus in an action on a bond prior to the stat. 8 & 9 Wm. 3, c. 11, two breaches could not have been alleged, because one was sufficient to give the right of action for the penalty; and, therefore, the stating two on the same bond would have been bad. So if, in the present

(*a*) 9 M. & W. 196.

(*b*) 4 Bing. N. C. 655; See S. C. 6 Scott, 402; 6 Dowl. 737.

case, the declaration had suggested another ground for making the defendant liable to pay the promissory note, there might be some colour for the objection which has been taken. But, in fact, the declaration shews, that the note was payable on the 25th March, and that the defendant was liable to pay it when due. An agreement then to pay the same on request, does not confer any cause of action on the note, but is bad as an absolute nullity. This declaration, therefore, is not open to this objection.

CRESSWELL, J., concurred, and referred to the case of *Owen* v. *Waters* (*a*), as overruling *Abbott* v. *Aslett* (*b*); and also to the case of *Galway* v. *Rose* (*c*), as supporting the principle laid down by *Maule*, J., respecting duplicity.

Judgment for the Plaintiff.

(*a*) 2 M. & W. 91; See S. C. 5 Dowl. 324.
(*b*) 1 M. & W. 209; See S. C. 4 Dowl. 759.
(*c*) 6 M. & W. 291; See S. C. 8 Dowl. 239.

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S C. 1 C B 733.

On a reference to arbitrators, with power to appoint an umpire to decide between them, in case they should differ in opinion; the arbitrators appointed an umpire; but no difference arising between them, the umpire was not consulted. In the award, the arbitrators recited that they had "considered the decision of the umpire:" *Held*, that this recital was mere surplusage.

GLOVER, Serjt., shewed cause against a rule nisi, obtained by *Talfourd*, Serjt., for setting aside an award on the ground that the award appeared on the face of it to have been founded partly on the decision of the umpire in the case, although it was not stated that any reference had been made to him in consequence of any difference of opinion between the arbitrators. It appeared that by an order of reference, the cause and all matters in difference between the parties had been referred to three persons, named H. Gibb, R. Crickner, and J. Shelsey. It was, amongst other things, ordered that as to the builder's and joiner's work, the arbitrators should adopt the opinion of Shelsey;

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and as to the machinery and other work, the opinion of Gibb and Crickner; and in case they should disagree then they should adopt the opinion of an umpire, to be appointed previously to their entering on the reference. The arbitrators duly appointed the umpire, but having no difference of opinion, the affidavits shewed that he had not interfered in any way with the inquiry. The award recited the order and then proceeded:—"And whereas we, the said arbitrators, Henry Gibb and Robert Crickner, did before proceeding with the said reference, by an indorsement on the said order in writing, under our hands, nominate and appoint Joseph Anns, of Union-street, Southwark, engineer, to be an umpire between us, the said H. Gibb and R. Crickner, to decide as to the work and machinery, except the carpenter's, builder's, and joiner's work, referred for our opinion or decision by the said order, in case we, the said H. Gibb and R. Crickner, should differ in our opinion thereon: now we, the said H. Gibb and R. Crickner, and John Shelsey, having taken upon ourselves the burthen of the said arbitration, and having heard and duly considered all the allegations and evidence of the said respective parties, of and concerning the matters in difference so referred as aforesaid, *and considered the decision of the said umpire*, do make and publish this our award." The objection to the award was, that it appeared on the face of it that the arbitrators had "considered the decision of the said umpire." This statement, however, would only be regarded as surplusage.

Talfourd, Serjt., in support of the rule. The arbitrators here had, as the affidavits shewed, stated on the face of their award what was untrue. What appeared to be the ground of their decision could hardly be treated as surplusage.

PER CURIAM.—The ground on which this rule was obtained was that the arbitrators falsely state that they have taken the advice of the umpire. It does not appear that

there was any difference between the arbitrators, and consequently if there was any consultation with the umpire, it amounted to nothing. This must, therefore, be treated merely as a mistake, and nothing more. The rule must be discharged, but without costs.

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Rule discharged without costs.

STEPHENS *v.* LOWNDES.

THIS was an action on a bill of exchange against the defendant as the acceptor. The defendant it appeared was an infant, being only eighteen years of age. After process had been served, the defendant not appearing in due time, the plaintiff entered an appearance for him in pursuance of the statute 2 Wm. 4, c. 39, s. 2, in the following form: "William Cox, attorney for the plaintiff, appears for the defendant ——— Lowndes, according to the statute." The appearance was entered on the 4th of February, and judgment signed on the 24th of the same month. On the 12th of April following, the defendant was taken on a writ of capias ad satisfaciendum. In the present Term a rule nisi was obtained to set aside the appearance entered by the plaintiff, as well as all subsequent proceedings.

Where a plaintiff appeared sec. stat. for an infant defendant, the Court set aside the appearance and subsequent proceedings without costs, on summary application.

Shee, Serjt., shewed cause against this rule. The question was, whether the appearance entered by the plaintiff could be considered as a mere irregularity or a nullity. When the rule was moved for, the case of *Roberts* v. *Spurr* (*a*) was cited. There, no appearance at all had been entered, and the Court held that a judgment signed under those circumstances for want of a plea, was a nullity. Here, however, an appearance had been entered, and, therefore,

(*a*) 3 Dowl. 551; See *contrà*, *Hackin* v. *Hassells*, *ante*, vol. 1, p. 1006; S. C. *div. nom.* 12 M. & W. 776.

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that case was no authority to shew that the plaintiff's proceedings were a nullity. The case of *Nunn* v. *Curtis* (*a*) was also cited. In that case, the Court of Exchequer held that an appearance entered as in the present case was an irregularity, but not a nullity. The Court, on the contrary, only set aside the proceedings subsequent to the appearance without costs, letting the defendant in to defend. No authority, therefore, shewed that the appearance as in the present case was more than an irregularity. If so, should the Court think that the objection was available at all, it had been clearly waived by lapse of time. But the plaintiff in the present case had pursued the course directed by sect. 2 of the Uniformity of Process Act, which made no exception in the case of an infant. The plaintiff had also adopted the form of entering an appearance given in the schedule to the act. [*Cresswell*, J.—It is error in ordinary cases if an infant appears by attorney; but if a statute directs that a plaintiff may, in default of the defendant's appearance, enter an appearance for him, that might perhaps make a difference.]

Byles, Serjt., in support of the rule. The authorities shewed that the plaintiff could not enter the appearance as in the present case for the defendant, and, if he did, a writ of error coram nobis might be brought. In *Tidd's Practice* (*b*) it was laid down, "an infant defendant must in all cases appear and defend by guardian, even where he is sued as co-executor with others. And common bail cannot be filed for him under the statute, though he be sued jointly with other defendants. If he appear by attorney it is error." In *Archbold's Practice* (*c*) it is also laid down, "a common appearance cannot be entered for the defendant" [an infant] "by the plaintiff; and, therefore, when the defendant neglects to enter an appearance, a Judge, upon applica-

(*a*) 4 Dowl. 729.
(*b*) 9th edit. p. 99.
(*c*) 7th edit. p. 893.

tion and without summons, will make an order 'that unless the infant appear within six days after personal service of the order, the plaintiff may assign John Doe for his guardian, and enter a common appearance for the defendant;' and upon affidavit of the service of this order, and shewing the original, the Judge will make the order absolute. An admission is then drawn up, &c., and a common appearance entered as in ordinary cases." In *Nunn* v. *Curtis*, the Court of Exchequer expressed an opinion, that the entry of appearance as in the present case was error, and directed the subsequent proceedings to be set aside, such an arrangement being for the benefit of all parties. These authorities shewed that the objection now taken would be available on error. If so, as neither party would in such a case be entitled to costs, it was most convenient, that the proceedings should be set aside on summary application.

COLTMAN, J.—In *Tidd's Practice* it is said, "an infant defendant must in all cases appear and defend by guardian, even where he is sued as co-executor with others. And common bail cannot be filed for him under the statute though he be sued jointly with other defendants. If he appear by attorney it is error." And in *Com. Dig. Plead.* (2 C. 2). "So, in an action against an infant, he must appear only by guardian, for he has not knowledge of his own affairs, or to choose a man to plead well for him, and may have an action against his guardian, if he loses by mispleading." It seems from the authorities, that the law considers it essential, that an infant should appear only by guardian, and that if he appear in any other manner a writ of error may be brought. The case of *Nunn* v. *Curtis* then applies, and the appearance and subsequent proceedings must be set aside, but without costs, and no action must be brought.

PER CURIAM.

Rule absolute accordingly.

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SC - 1 CB . 826

SCOTT *v.* WATSON.

Where a defendant is under terms of pleading issuably, and one of the pleas is a set-off; obtaining an order for particulars of the set-off is a waiver of the objection that the pleas are not issuable.

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CHANNELL, Serjt., shewed cause against a rule obtained by *Byles*, Serjt., for setting aside a judgment signed by the plaintiff as for want of a plea. The defendant was under terms to plead issuably, and two questions arose; first, whether the pleas were issuable; and secondly, if they were not, had the plaintiff waived the objection by obtaining an order for particulars of a plea of set-off which was among the pleas pleaded. The plaintiff declared on the 17th April. The defendant obtained two orders for time to plead on the usual terms of pleading issuably, &c. On the 19th May, he pleaded a special plea to the action, and a plea of set-off. On the 20th, the plaintiff served a summons for particulars of the defendant's plea of set-off. A consent to an order for the particulars was given on the 21st, and an order made. On the 23rd, that order was abandoned, and on that day judgment was signed, on the ground that both the pleas were not issuable, and therefore not a compliance with the terms of the order for time to plead. As to the non-issuable quality of the first plea, there would perhaps be no doubt. Then the question was, whether, obtaining the order for particulars operated as a waiver of the objection. It was submitted that it did not. The attorney for the plaintiff was entitled to take some time for the purpose of considering whether the pleas were issuable or not. He would also most probably have to take the opinion of his pleader. An unreasonable time for the purpose of determining whether the pleas were issuable or not, had not been taken by the plaintiff's attorney between the 20th and 23rd May. The plaintiff therefore had not waived the objection.

Talfourd, Serjt., contrà, was stopped by the Court.

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PER CURIAM.—The pleas are not nullities. The plaintiff may accept them or not. By obtaining an order for particulars, the plaintiff has treated them as pleas. The attorney must be presumed to know whether the pleas are issuable or not. If not, he should then consult his counsel. There could be no occasion to take out an order for particulars for that purpose. The rule must be absolute.

Rule absolute.

STEAD *v.* POYER and Another. *Sc. 1. Cb. 782.*

To assumpsit for goods sold and delivered, the defendants pleaded, that at the request and by the direction of the plaintiff, they delivered the goods to one K., on a day named, and that it was "then," to wit, on the day and year aforesaid, in consideration thereof agreed by and between the plaintiff and the defendants, that the plaintiff should accept such delivery to K. in full satisfaction and discharge, &c., and that the plaintiff did "then" accept such delivery in full satisfaction and discharge: *Held*, on special demurrer, that the plea was bad, for not shewing with sufficient certainty that the agreement by the plaintiff to accept the delivery to K. in full satisfaction, &c., was antecedent to, or at least contemporaneous with, the delivery to K.

DECLARATION in assumpsit, the second count in which was for goods sold and delivered.

The defendants pleaded, as to the sum of 4*l.*, parcel of the monies in the second count mentioned, that after the making of the promises in that count mentioned, and before the commencement of this suit, to wit, on the 4th day of January, A.D. 1844, they, the defendants, at the request and by the direction of the plaintiff, delivered to one William Kerr, for the plaintiff, a large quantity of paving blocks, to wit, 10,000 paving blocks, being parcel of the said goods, chattels, &c., in the said second count mentioned to have been sold and delivered by the said plaintiff to the defendants; and it was then, to wit, on the day and year aforesaid, and before the commencement of this suit, in consideration thereof, agreed by and between the plaintiff and the defendants, that the plaintiff should accept such delivery to the said W. Kerr, in full satisfaction and discharge of the promises in the said second count mentioned, as to the said sum of 4*l.*, parcel, &c., and of all damages by him sustained by reason of the non-performance

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thereof; and the plaintiff did then accept such delivery in full satisfaction and discharge of the said promises and damages aforesaid. Verification.

To this plea the plaintiff demurred upon the following grounds:—that the plea neither traversed nor sufficiently avoided the cause of action to which it was pleaded: that it was not averred, nor did it sufficiently appear in or by the said plea, how, in what manner, or under what circumstances, the defendants, by the said delivery to the said W. Kerr, of the paving blocks therein mentioned, became or were discharged from their promises, or the causes of action therein pleaded to: that the said plea did not sufficiently aver or shew, or if it did aver or shew, it shewed only by argument and inference, that the said blocks were delivered by the said defendants to the said W. Kerr, or the plaintiff, in accord and satisfaction of the said promises or causes of action, or after or in pursuance of the said alleged agreement; or what connexion, if any, there was between the said delivery and agreement: that the said plea did not aver or state with sufficient certainty, any consideration or value for the plaintiff's entering into the said agreement, or that the said blocks were of any value: that the said plea, if good at all, was only good as a round-about plea of accord and satisfaction, and ought to have followed the usual and approved form of such a plea, by stating a delivery and acceptance in accord and satisfaction: and that it savoured of novel and strange device, and was calculated to perplex the plaintiff in replying thereto.

Channell, Serjt., in support of the demurrer. This plea is ambiguous, and calculated to mislead the plaintiff. It is not averred that the delivery to Kerr was in full satisfaction and discharge. It is only averred, that it was then agreed that the plaintiff should accept such delivery in full satisfaction and discharge. That agreement might have been made on another occasion, and at another place, and

subsequent to the delivery. It does not shew any sufficient acceptance by the plaintiff in full satisfaction and discharge. It says, the plaintiff did "then" accept such delivery. "Then" may have reference to a time subsequent to the delivery, and not to the agreement. The plaintiff cannot reply de injuriâ; and if he traverse the delivery to Kerr, the averment of acceptance may be sufficient after verdict.

Byles, Serjt., contrà. It is submitted that the plea is good. In *Peytoe's case* (*a*), Lord Coke says, "The best and most secure form of pleading of an accord, is to plead it by way of satisfaction, and not by way of accord." In the present instance that course has been followed. The facts pleaded, shew a sufficient delivery; and then there is an averment, that in point of fact the plaintiff accepted the delivery to Kerr as satisfaction. It is said, however, that it does not sufficiently appear by the word "then," that that acceptance was contemporaneous with the delivery. In *Thornton* v. *Jenyns* (*b*), where the declaration alleged, that in consideration, that the plaintiff had then promised the defendants to observe and perform all things on his part to be observed and performed, the defendants then promised the plaintiff to observe and perform all things on their parts to be observed and performed; and the same objection being there made, *Tindal*, C. J., in delivering judgment says, "I think that the fair and reasonable construction of this allegation is, that the word 'then' relates to the same period of time in the case of both promises; and that we are not bound to refer the one promise to a period antecedent to the other, although the plaintiff's promise may possibly have preceded the defendants', but that we may take them to have been simultaneously made." [*Maule*, J.—That was not upon special demurrer to the declaration]. The case of *Webb* v. *Weatherby* (*c*), shews that the plaintiff may reply to a plea of

(*a*) 9 Rep. 80, a.
(*b*) 1 M. & G. 166; See S. C. 1 Scott, N. R. 52.
(*c*) 1 Bing. N. C. 502; See S. C. 1 Scott, 477.

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payment in accord and satisfaction, that the defendant did not pay the sum in satisfaction, nor did the plaintiff receive it in satisfaction. The plaintiff, therefore, could not be in any embarrassment in the present case, as to the mode in which he was to answer this plea. Nor can it properly be said to be a deviation from the usual form of plea, as there is no prescribed form.

Channell, Serjt., in reply, was stopped by the Court.

TINDAL, C. J.—I think that the word "then," may possibly mean the same period of time; and that when the defendants allege, that upon a given day they delivered the blocks by the direction of the plaintiff, and that it was "then," to wit, on the day and year aforesaid, in consideration thereof, agreed by and between the plaintiff and the defendants, that the plaintiff should accept such delivery in full satisfaction and discharge, and that the plaintiff did "then" accept such delivery in full satisfaction and discharge; they really mean that such agreement was contemporaneous with the delivery. That would be the natural inference; but at the same time it is obvious that the expression is capable of another construction. It may possibly mean that "then," that is after the delivery, the plaintiff agreed; and therefore it is not so clearly stated as to exclude all doubt, or to be certain to a common intent; and when I see that the defendants have departed from the usual form, which usage has prescribed, I think we are bound to see that they do not travel extra viam. As the defect is pointed out on special demurrer, it must prevail.

COLTMAN, J.—The word "then" is capable of two constructions. It may mean, that the whole took place at one and the same time, or the defendants at the trial may say the plaintiff was present at the delivery, that they then all went elsewhere and afterwards and in another place made the agreement.

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MAULE, J.—I am of the same opinion. The plea is studiedly ambiguous. It would be supported in the ordinary sense of its language by proof at the trial, that the plaintiff after the delivery and on a subsequent occasion, agreed to accept the delivery in satisfaction, which would be no defence to the present action. If the plaintiff had pleaded over, the case might then have been different, and the plea might perhaps have been good; as by adopting such a course the plaintiff admits that the plea affords an answer, and that if by any construction an answer can be given, that construction shall be considered as its meaning. But here the objection is pointed out on special demurrer, and I think must prevail.

CRESSWELL, J., concurred.

Judgment for the Plaintiff.

FRANKLIN *v.* CARTER.

To covenant for rent, the defendant pleaded as to 2*l.* 0*s.* 10*d.* parcel, &c., that before any part of the rent became due,

COVENANT on an indenture of 6th February, 1839, between the plaintiff and the defendant, by which the plaintiff demised to the defendant a messuage and shop from the 25th of March, then next for twenty-one years at a yearly rent of 70*l.* Breach, that the defendant had not to wit, on, &c., a large sum of money, to wit, 2*l.* 0*s.* 10*d.*, "being at and after the rate of 7*d.* for every 20*s.* of the annual value, to wit, 70*l.*, of the said messuage," &c., was duly, and according to the form of the statute in such case made and assessed on the said messuage, &c., in respect of the property thereof, for the year then next ensuing;" and that the defendant then being the occupier and tenant thereof, paid that sum to the collector; and that the defendant had never since made any payment to the plaintiff on account of the said rent: *Held*, on general demurrer, that this was a good plea under the Income Tax Act, 5 & 6 Vict. c. 35.

The defendant also pleaded as to 52*l.* 0*s.* 10*d.* parcel, &c., that the plaintiff himself held under a lease, with a clause of re-entry in case of breach; that he committed a breach; that "by reason and in consequence of the said forfeiture," John Doe brought his action on the demise of the superior landlord, the date of which was laid on the day of the forfeiture and before the rent accrued due; that judgment was recovered, and notice thereof given to the defendant, who was compelled to pay the rent to the superior landlord: *Held*, on special demurrer, that the plea was good; it not being alleged as a ground of demurrer that it was not shewn that the ejectment proceeded on the ground of the forfeiture.

Quære, even if it had been alleged, would not the plea have been good?

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paid a year's rent due, and in arrear on the 29th September, 1844.

First Plea. As to the sum of 2*l.* 0*s.* 10*d.*, parcel of the sum of 70*l.* in the said declaration mentioned, as due and in arrear to the plaintiff, the defendant saith that after making the said indenture, and whilst the defendant held the said tenements thereunder as tenant thereof to the plaintiff, and whilst the plaintiff was entitled to the said annual sum of 70*l.* reserved by the said indenture, and before any part of the rent in the declaration mentioned had accrued due, (to wit), on the 5th day of April, in the year of our Lord one thousand eight hundred and forty, a large sum of money, to wit, 2*l.* 0*s.* 10*d.*, being at and after the rate of 7*d.* for every 20*s.* of the annual value, (to wit), 70*l.*, of the said messuage, tenement, shop, and premises, was duly and according to the form of the statute in such case made and assessed on the said messuage, tenement, shop, and premises, in respect of the property thereof, for the year then next ensuing; which said sum of 2*l.* 0*s.* 10*d.*, was payable by four quarterly instalments, that is to say, on the 20th day of June, the 20th day of September, the 20th day of December, and the 20th day of March, then next ensuing: and afterwards and before the commencement of this suit, to wit, on the 28th day of August, in the year of our Lord, one thousand eight hundred and forty-four, the defendant then being the occupier and tenant of the said messuage, tenement, shop, and premises, paid to Thomas Casey, then being the collector of the said tax, the said sum of 2*l.* 0*s.* 10*d.*; and the said sum of 2*l.* 0*s.* 10*d.*, so paid by the defendant, was and is 7*d.*, for every 20*s.* of the said sum of 70*l.*, the annual rent payable by the defendant to the plaintiff, under and by virtue of the said indenture, for the said messuage, tenement, shop, and premises: and the defendant has never made any payment to the plaintiff, on account of the rent of the said messuage, tenement, shop, and premises since the payment of the said sum of 2*l.* 0*s.* 10*d.*: and this the defendant is ready to verify, &c.

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Second Plea. As to the sum of 52*l.* 0*s.* 10*d.*, parcel of the said sum of 70*l.* in the declaration mentioned, being the rent which is alleged to have accrued due on the 25th day of March, the 24th day of June, and the 29th day of September, in the year of our Lord, one thousand eight hundred and forty-four, and the damages and causes of action in respect thereof, the defendant says that the plaintiff ought not further to maintain his action thereof, because he says that before and at the time of making the indenture in the declaration mentioned, to wit, on the 14th day of August, A.D., 1820, Robert John Smith, was lawfully possessed for a term of years, whereof upwards of fifty-three and a half years, wanting twenty-one days from the 24th day of June, were to come and unexpired, of and in the said messuage, tenement, shop, and premises, in the declaration mentioned; and being so seised thereof, before making the said indenture, to wit, on the said 14th day of August, in the year last aforesaid, by a certain indenture then made between the said R. J. Smith, of the one part, and the said plaintiff, of the other part, the said R. J. Smith, did demise and lease the said messuage, tenement, shop, and premises, with the appurtenances in the declaration mentioned unto the plaintiff, his executors, administrators, and assigns, to have and to hold the same unto the plaintiff, his executors, administrators, and assigns, from the 24th of June, then last for and during and unto the full end and term of fifty-three years and a half, wanting twenty-one days from thence next ensuing, and fully to be completed and ended; and the plaintiff did in and by the said last mentioned indenture, amongst other things covenant, promise, and agree with, and to the said R. J. Smith, that he, the plaintiff, his heirs, &c. (Covenant to repair). And also that the plaintiff, his executors, administrators, or assigns, should and would from time to time, and at all times during the said term thereby granted, insure or cause to be insured, the said messuage, tenement, shop, and premises, and every part thereof, in the Albion Fire Office, in

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London, to the full amount of the value thereof. And in and by the said last mentioned indenture, it was and is afterwards provided, and the said last mentioned indenture was declared to be upon the express condition, that if the plaintiff, his executors, administrators, or assigns, should not in and by all things well and sufficiently observe, perform, fulfil, and keep all and singular the covenants, clauses, articles, conditions, and agreements, in the said last mentioned indenture before contained, which on his and their part and behalf, were and ought to be observed, performed, fulfilled, and kept according to the true intent and meaning of the same indenture, then and from thenceforth and in either of the said cases, it should and might be lawful for the said R. J. Smith, into and upon the said messuage, tenement, shop, and premises, in the name of the whole wholly to re-enter, and the same to have again, retain, repossess, and enjoy as in his first and former estate, and the plaintiff, his executors, administrators, and assigns, and all other occupiers, thereout and thence utterly to expel, put out, and amove; the same indenture or anything thereinbefore contained to the contrary in anywise notwithstanding. And the defendant further saith, that after the making the last mentioned indenture, and before making the indenture in the declaration mentioned, to wit, on the said 14th day of August, in the year of our Lord, one thousand eight hundred and twenty, the plaintiff entered into the said messuage, tenement, shop, and premises, and became and was possessed thereof, under and by virtue of the said indenture, between the said R. J. Smith and the plaintiff, for the term by the same indenture granted, and was so thereof possessed at the time of making the indenture in the declaration mentioned; and that afterwards and before any part of the rent in the introductory part of this plea mentioned, accrued due and in arrear, to wit, on the first day of January, in the year of our Lord, one thousand eight hundred and forty-four, the plaintiff did not nor would on the day and year last aforesaid, insure or

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cause to be insured, the said messuage, tenement, shop, and premises, in the said Albion Fire Office, but wholly neglected so to do, and the same was on the day and year last aforesaid wholly uninsured in the said Fire Office, contrary to the form and effect of the said covenant in that behalf made. And the defendant further saith, that by means of the premises aforesaid, after the making the indenture in the declaration mentioned, and before any part of the said sum of 52*l.* 0*s.* 10*d.*, parcel, &c., became due and payable, and before the commencement of this suit, to wit, on the first day of January, in the year of our Lord, one thousand eight hundred and forty-four, the estate, term, and interest of the plaintiff in the said demised premises, became and was ended, forfeited, and determined. And the defendant further saith, that by reason and in consequence of the said forfeiture, John Doe, on the demise of the said Robert John Smith, afterwards to wit, in Hilary Term, in the seventh year of the reign of our lady, the now Queen, commenced an action of trespass and ejectment in the Court of Queen's Bench at Westminster, to which said action the plaintiff afterwards in Easter Term, in the year last aforesaid, duly appeared in the said Court to defend the same, as the landlord of the said messuage, tenement, shop, and premises, and pleaded thereto; and thereupon to wit, in Hilary Term, in the year last aforesaid, the said John Doe duly declared in the said Court in the said action against the plaintiff;—for that the said R. J. Smith, on the first day of January, in the year of our Lord, one thousand eight hundred and forty-four, being a day before any part of the said sum of 52*l.* 0*s.* 10*d.*, parcel, &c., became payable, demised to the said John Doe, amongst other tenements the said messuage, tenement, shop, and premises, in the declaration mentioned with the appurtenances; to hold to the said John Doe, and his assigns, from thenceforth for and during the full end and term of seven years from thence next ensuing, and fully to be complete and ended; by virtue of which same demise, the said John Doe entered

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into the same tenements with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted; and the said John Doe being so thereof possessed, the now plaintiff, afterwards, on the day and year last aforesaid, entered into the same tenements in which the said John Doe was so interested in manner and for the term last aforesaid, and ejected him from his said farm:— And that such proceedings were thereupon had in the said Court in the said action, that afterwards and after the commencement of this suit to wit, on the 28th day of January, in Hilary Term, in the eighth year of the reign of our lady, the now Queen, it was considered by the said Court, that the said John Doe should recover against the now plaintiff his said term yet to come of and in the tenements aforesaid with the appurtenances; as by the record and proceedings thereof still remaining in the said Court, reference being thereunto had, will appear; of all which premises the said R. J. Smith, afterwards to wit, on the day and year last aforesaid gave notice to the now defendant, and then called upon and required him to attorn tenant to him the said R. J. Smith, of the said messuage, tenement, shop, and premises, and to pay and satisfy him for the proceeds, issues, and profits of the said messuage, tenement, shop, and premises, from the day of the demise to the said John Doe in the said declaration mentioned. And the defendant then attorned tenant to the said R. J. Smith, of the said messuage, tenement, shop, and premises, and paid and satisfied him for the said profits, issues, and proceeds of the same, a large sum of money, to wit, 52*l.* 0*s.* 10*d.* And this the defendant is ready to verify, &c.

As to the first plea, general demurrer. The plaintiff's point for argument was, that the payment for taxes in the first plea mentioned, can only be claimed by the defendant upon payment by him to the plaintiff of the residue of the rent in arrear.

As to the second plea, special demurrer, stating the following causes: that although the defendant has in the

said second plea admitted the making the said indenture of lease in the said declaration set forth, and that he, the defendant, thereupon entered into the said demised premises, and became thereof possessed as tenant to the plaintiff for the said term; yet the defendant has attempted to deny and attempted to put in issue, the plaintiff's title as landlord to the said premises, which the defendant is by the said indenture and tenancy estopped from doing: that the said plea admits and confesses a breach of the covenant and nonpayment of the rent, and a right of action in the plaintiff, without showing how or when the same was satisfied or discharged, or how the defendant is not in law liable to recover for breaches of covenant in the said lease, or liable for damages in respect of any such breach: that although the defendant in his second plea alleges, that the title of the plaintiff to the said premises was forfeited before the commencement of this action, for the nonperformance of the covenants contained in a certain indenture of demise in the said second plea set forth; the defendant has yet pleaded and relied upon such indenture without making profert of or offering to produce the same, or shewing any matter in excuse of such profert: that the said second plea is double and multifarious in this, that it is therein stated that the said term and interest of the plaintiff had expired and determined before the commencement of this suit, and also that the defendant was evicted by title paramount to that of the plaintiff: that by the said second plea it is attempted to put in issue matters of law: and that no certain issue can be taken thereon.

Channell, Serjt., (with whom was *Petersdorff*), in support of the demurrers. The first plea is intended to set up a defence under the provisions of the Income Tax Act, the 5 & 6 Vict. c. 35, sec. 60. r. 9. That statute, however, only permits the tenant to make a deduction "out of the first payment thereafter to be made on account of rent." It does not enable him to plead the deduction by way of

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bar to an action for the rent, which is here attempted to be done. Besides, it does not appear that the sum of 2*l.* 0*s.* 10*d.*, became due after the passing of the Income Tax Act. The allegation is, that "before any part of the rent in the declaration mentioned had accrued due, to wit, on the 5th of April, eighteen hundred and forty, a large sum of money to wit, 2*l.* 0*s.* 10*d.*" was duly made and assessed, &c., in respect of the said messuage, &c., "for the year next ensuing." Either the allegation of time, although laid under a videlicet, is material, and then it appears to have been due before the 5 & 6 Vict. c. 35, was passed; or the date is not material, and then it is bad for want of an allegation, that it accrued due after the passing of the statute. [*Tindal*, C. J.—I think we must take it that the date here given is a mere clerical error for 1843, which is plainly meant (*a*).] Even with the date as 1843, it does not appear that the tax is deducted out of the year's rent then due; which the case of *Denby* v. *Moore* (*b*), shews ought to be done. [*Cresswell*, J.—The statute says he is to deduct it "out of the first payment thereafter to be made on account of rent;" and the plea states that on the 5th of April, 1843, before any part of the rent had accrued due, the defendant paid the sum of 2*l.* 0*s.* 10*d.* for Income Tax, assessed in respect of the property "for the year then next ensuing." Is not that sufficient?]

With respect to the second plea, there is no statement that the defendant had notice at the time of the ejectment brought; and there is no eviction till after this suit. Then the rule applies that to make this a defence in an action for rent, it should be shewn that the eviction took place before the rent became due. The defendant must either rely on this plea, as shewing a forfeiture of his landlord's title, or as a plea of eviction. If the first be relied on, then the plea is bad for being double, in containing also a statement

(*a*) It appeared that this was the date given in some of the paper books.

(*b*) 1 B. & A. 123.

of an eviction; if the latter, then it is bad for not shewing an eviction before rent due. [*Cresswell*, J.—The averment in the plea is, that afterwards, and before the rent became due, the plaintiff forfeited his lease. Now that forfeiture might have been waived; but the defendant goes on to shew that it was not; but that an action of ejectment was brought and judgment recovered against the plaintiff.] The defendant cannot gain a defence by effluxion of time; and he would not have had this defence, if the action had been brought before the ejectment. It is not shewn that the landlord elected to take advantage of the forfeiture. The action of ejectment might be brought on a totally different ground. Taking both of these pleas together, it would appear that if the forfeiture were before the rent became due, the defendant's right to deduct would be as against his new landlord; *Tinckler* v. *Prentice* (*a*).

Byles, Serjt., contrà. The first plea is sufficient under the 5 & 6 Vict. c. 35, s. 60, rule 9, which authorizes the tenant paying the income tax, to deduct the same out of the first payment of rent thereafter to be made. The plea states, that before the rent accrued due, this tax was payable in respect of the year then next ensuing, and that the defendant has never made any payment since to the plaintiff of rent. On an issue of riens in arrear, payment to the mortgagee, would, it is submitted, support the issue. The only question, therefore, is, whether this plea sufficiently shews the payment to have been made on account of the income tax. [*Tindal*, C. J.—One can scarcely doubt that, I think; when it is stated that "2*l.* 0*s.* 10*d.*, being at and after the rate of 7*d.* for every 20*s.* of the annual value, (to wit) 70*l.* of the said messuage, &c., was made and assessed on the said messuage, &c., in respect of the property thereof, for the year then next ensuing, &c."]

With respect to the second plea, it is incorrect to state

(*a*) 4 Taunt. 549.

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that it contains a double defence by reason of the forfeiture of the landlord's title, and also by way of eviction. The plea shews a forfeiture of the original lease, but that alone would not have been a sufficient answer. It goes on to shew, that that forfeiture had been taken advantage of by the original landlord, by an action of ejectment, in which he had recovered judgment, and that he had given notice to the defendant to attorn and pay rent to him, which he had accordingly done. It is said, that it is not shewn that the ejectment proceeded in consequence of this forfeiture. It is, however, alleged, that "by reason and in consequence of the said forfeiture," the action of ejectment was brought. That is sufficient to satisfy this objection, which is not pointed out in the grounds of demurrer.

Channell, Serjt., in reply. The latter part of the plea is a defence in effect by way of eviction, although not in terms.

TINDAL, C. J.—The defendant is at liberty to shew that his landlord's title has expired. That may be either by efflux of time, or by the breach of a condition for which the superior landlord has entered. Now the latter objection is the one set up in the second plea, and the only answer that is made to it, is, that it is only stated argumentatively that the ejectment has proceeded on the ground of the forfeiture mentioned in the former part of the plea. That objection, however, is not pointed out in the grounds of demurrer. The plea states, "that by reason and in consequence of the said forfeiture," an action of ejectment was brought by John Doe, and then states a demise by the original landlord to John Doe, (not laid under a videlicet) on the 1st day of January, 1844, being a day before any part of the rent became payable from the defendant to the plaintiff, by virtue of which demise John Doe entered and became possessed thereof. So that there is a statement, that there was another party in possession before the rent

became due. Then follows the subsequent judgment of the Court, that John Doe should recover his said term, which would of course date back from the day of the demise. But as the judgment was given since this action was brought, the defendant was obliged to plead it to the further maintenance, and not in bar of the action.

COLTMAN, J.—There can be no doubt that the facts of the case afford a substantial answer to this action. But I have had some difficulty in satisfying my mind that they have been properly pleaded. The second plea states, that before this action was brought, the plaintiff had forfeited his lease, and that afterwards the original landlord brought his action of ejectment. That seems to me at most but an argumentative statement, that the landlord brought his ejectment on that forfeiture; and as such, perhaps, would have been defective, if specially pointed out as a ground of demurrer. As that ground of objection, however, has not been stated, I think the plea must be held sufficient.

MAULE, J.—I am of opinion that both these pleas are good. As to the first, although I was at the commencement of the argument inclined to doubt about its sufficiency, I think it may be sufficiently gathered from its language to what statute it refers. Now the defendant says, that the statute respecting the income tax will satisfy all that is here set out in the plea. It is not suggested on the other side that there is any other statute to which it would equally apply, so as to create a difficulty as to which it meant; and I therefore think that the Court, who are taken to be acquainted with all the statutes, may consider the Income Tax Act as sufficiently pointed out as the statute relied on in this plea. Then the question arises whether the money paid under the income tax may be properly deducted out of the next payment of rent. I think, without any straining of the words of the act, it may be deducted out of the next payment, whenever that payment is made. With

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respect to the other plea, it is in substance this: that the plaintiff was himself a tenant to one Smith under a lease, in which there was a covenant for re-entry in case of breach of covenants; that the plaintiff committed a breach; that an action of ejectment was brought, the term recovered, and the defendant compelled to pay the superior landlord. There can be no doubt that these facts afford a sufficient defence on the merits, and the only question is, whether they are properly pleaded? I think the plea is good. It states that a breach of covenant had occurred, that the superior landlord had a right of entry; that he took proceedings and recovered the term from the time of the forfeiture, and that the defendant was required to satisfy the rent due from that time. The statement is, that "by reason and in consequence of the said forfeiture," J. Doe, on the demise of Smith, brought his action of ejectment. If that is equivalent to a statement that it was by reason of the forfeiture that Smith afterwards entered, then it is sufficient; and, if not, when you shew that there was one good cause of forfeiture, and that the party enforced his title from that day, and recovered the term by judgment in ejectment, you shew circumstances that prevented the defendant from resisting Smith's turning him out. If Smith had the right of entry, that, with the other circumstances mentioned, was all that was necessary to entitle the defendant to resist the present action.

CRESSWELL, J., concurred.

Judgment for Defendant.

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THIS was a declaration on the case with a count in trover, for household furniture, goods and chattels.

The defendant pleaded, inter alia; that before and at the time of the committing of the said grievance in that count mentioned, and during all the time during which the rent distrained for, as hereafter mentioned, was accruing due, to wit, on the 24th of June, 1844, and for a long time before, to wit, for half-a-year before that day, the plaintiff held and enjoyed a certain messuage, with the appurtenances, as tenant thereof to the defendant, under and by virtue of a certain demise thereof, before then made to the plaintiff, at and under the yearly rent of 56*l.* payable by the plaintiff for the same quarterly, on the 25th of March, &c. in each and every year during the continuance of the said demise, by even and equal portions, the reversion of and in the said messuage during all the time aforesaid and still belonging to the defendant; that during the said demise and tenancy, and before the time of the committing of the said grievance in the said last count mentioned, to wit, on the 24th of June, 1844, a large sum of money, to wit, 28*l.* of the rent aforesaid for the space of half-a-year ending on the day and year last aforesaid, and then last elapsed, became and was due and payable from the plaintiff to the defendant, and from thence until and at the time of the committing of the said grievance by the defendant in the said count mentioned, remained and continued due and in arrear; and the defendant afterwards and whilst the said rent so remained due, in arrear and unpaid as aforesaid, and during the continuance of the said demise and tenancy, to wit, on the day and year in the last count mentioned, entered into and upon the said mes-

Count in trover for goods and chattels. Plea justifying the taking of them under a distress for rent. Replication, that the defendant had made a former distress for the same rent, on goods of sufficient value to satisfy the distress, and might have fully satisfied the rent out of the same; but that he wrongfully and vexatiously refused and omitted so to do. Rejoinder, that the goods and chattels, taken under the former distress, were not of sufficient value to satisfy the rent; and that the defendant afterwards lawfully abandoned and put an end to the distress, and that the rent was still in arrear. Surrejoinder, that the goods were of sufficient value: *Held*, on demurrer, that the replication was a good answer to the plea; for a landlord could not make a second distress for the same rent, after wantonly abandoning a prior distress, where the goods taken under the first distress were of sufficient value to satisfy the rent: *Held*, also, that the plaintiff was entitled to judgment on these pleadings; for either the surrejoinder was good, if the rejoinder were to be read so as to make the insufficiency of the goods distrained the ground for abandoning the distress; or, if it could not be so read, the rejoinder was bad, for not shewing any lawful ground for relinquishing the first distress, and taking a second, so as to answer the matters alleged in the replication.

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suage, the outer door thereof being then open, in order to distrain for the said arrears of rent, and did then and there distrain the said goods and chattels in the said last count mentioned, then being in and upon the said messuage, and subject and liable to such distress, as and for a distress for the said arrears of rent so due and owing to the defendant as aforesaid, and as the defendant lawfully might for the cause aforesaid; and the defendant did thereupon, to wit, on the day and year last aforesaid, take and seize the said goods and chattels, and impound the same, as a distress for the said arrears of rent so due as aforesaid, as he lawfully might for the cause aforesaid, and did thereupon give notice to the plaintiff of such distress, and the cause of such taking; and which said seizure and taking of the said goods and chattels, as such distress as aforesaid, was and is the said grievance in the said last count mentioned, and whereof the plaintiff hath above complained against the defendant. Verification.

Replication: that after the arrears of rent in the plea mentioned had become due and payable, and before the committing the grievance in the last count mentioned, and before the seizing, taking, or distraining the goods and chattels in the last count mentioned, as in the plea mentioned, to wit, on the 25th of June, 1844, the defendant seized, took and distrained divers goods and chattels of the plaintiff other than the goods and chattels in the last count mentioned, that is to say, the goods and chattels in the first count mentioned, as a distress for the said arrears of rent in the plea mentioned, the last mentioned goods and chattels then being in and upon the said messuage, with the appurtenances, and then being subject and liable to a distress for the said arrears of rent, and of sufficient value to satisfy the said arrears of rent, and the costs and charges of the same distress, the appraisement, and sale thereof; and the defendant then could, and might, and ought to have fully paid and satisfied the said arrears of rent, and the costs and charges of the said distress, the appraisement and sale thereof, out of and with the last mentioned goods and chattels; yet the defendant wrongfully and vexatiously and without any cause

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or excuse refused and neglected so to do; and after making the distress in the replication mentioned for the said arrears of rent on the last mentioned goods and chattels, to wit, at the said time when, &c., in the last count mentioned, of his own wrong, vexatiously seized and took the goods and chattels in the last count mentioned, and converted and disposed thereof to his own use, in manner and form as the plaintiff had above thereof complained against him. Verification.

Rejoinder, that the goods and chattels so seized, taken and distrained as in the replication mentioned before the making of the said distress in the plea mentioned, were not of sufficient value to satisfy the said arrear of rent; that the defendant afterwards and before the making of the distress in the plea mentioned, to wit, on the said 25th day of June, 1844, lawfully abandoned and put an end to the said distress in the replication mentioned, and withdrew from the possession of the said goods and chattels seized, taken and distrained under the same, and did not at any time sell or dispose of the said goods and chattels, or any or either of them, or any part thereof, under the said distress; and the said rent so distrained for as in the plea mentioned, at the time of the making of the said distress in the plea mentioned remained and was wholly unpaid and unsatisfied; and so the defendant further saith, that he did not of his own wrong vexatiously make the said distress in the plea mentioned. Verification.

Surrejoinder, that the goods and chattels seized, taken and distrained as in the replication mentioned, were of sufficient value to satisfy the said arrears of rent, in manner and form, as in the replication alleged. Conclusion to the country.

Special demurrer, assigning for causes, that the surrejoinder took issue upon immaterial matter, and raised an immaterial issue, namely, whether the said goods and chattels therein mentioned were of sufficient value to satisfy the said arrears of rent: that the surrejoinder did not traverse or

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confess and avoid the material allegations in the rejoinder, namely, that the defendant, lawfully abandoned and put an end to the said distress, and withdrew from the possession of the said goods and chattels, and did not sell and dispose of the same, and that the rent so distrained for at the time of the making of the said distress in the plea mentioned, remained and was wholly unpaid and unsatisfied.

Joinder in demurrer.

Talfourd, Serjt., in support of the demurrer (*a*). It is submitted, that the surrejoinder tenders an immaterial issue. Whether the goods were or were not of sufficient value to satisfy the distress is immaterial, provided the defendant abandoned the distress before sale. The case of *Lear* v. *Edmonds* (*b*), shews, that in an action for use and occupation, a plea that the plaintiff before action, took and detained, as a distress for the rent, goods of value sufficient to satisfy the same, is bad, for not shewing that the rent was satisfied. In *Lingham* v. *Warren* (*c*), a plea in bar to an avowry for rent, to the same effect, was held bad for the same reason. So in *Hudd* v. *Ravenor* (*d*). The first distress may have been abandoned at the request of the plaintiff.

Gaselee, Serjt., contrà. The issue tendered is material. A landlord cannot, after distraining goods of sufficient value to satisfy the rent, wantonly abandon the distress and make a second distress for the same rent. In 1 *Wms. Saund.* 201, *n.* 1, 6*th ed.*, it is laid down that, "regularly at the common law, where there is an entire duty or rent due, a man should distrain for the whole at once, and not for part at one time and part at another, for that would be oppressive and illegal;—and therefore if he distrains a second time for the same thing, he ought to shew that at the time of taking the first distress there was not sufficient on the premises, or

(*a*) In Easter Term.
(*b*) 1 B. & A. 157.
(*c*) 2 B. & B. 36; See S. C. 4 Moore, 409.
(*d*) 2 B. & B. 662; See S. C. 5 Moore, 542.

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that he had mistaken the value, and that the first distress was only of such a value; otherwise the second distress will be bad." If the first distress were of insufficient value, then he has a right to make a second distress by express legislative provision, 17 Car. 2, c. 7, s. 4; but not otherwise. The case of *Wallis* v. *Savill* (*a*), shews that a plea stating a second distress for the residue of the rent, without shewing that there had not been sufficient on the premises to satisfy the first distress, is insufficient; "car un ne poiet avower deux distresses pur un mesme rent, car fuit son folly que il n'ad pris un sufficient distress al primes;" and *Moore*, 7, pl. 26, and *Cro. Eliz.* 13, ca. 8, are there referred to as supporting this position. The case of *Wallis* v. *Savill* was acted on in *Hutchins* v. *Chambers* (*b*). Nor are there wanting recent authorities to the same effect. The case of *Smith* v. *Goodwin* (*c*), shews that an action will lie against a landlord who distrains goods of sufficient value to satisfy the rent, and afterwards abandons the same, and then again distrains the same goods for the same rent. *Lear* v. *Caldecott* (*d*) is another authority to the same effect. The case of *Lear* v. *Edmonds* only shews that in an action for use and occupation, it is no defence that a distress has been made, unless it be shewn that the distress has been satisfied. That does not affect the question of the right of the landlord to make a second distress. The same remark applies to the other two cases of *Lingham* v. *Warren*, and *Hudd* v. *Ravenor*, which have been cited by the other side. He referred also to *Vasper* v. *Eddowes* (*e*).

Talfourd, Serjt. was heard in reply (*f*).

Cur. adv. vult.

(*a*) 2 Lutw. 1532.
(*b*) 1 Burr. 579.
(*c*) 4 B. & Ad. 413; See S. C. 1 N. & M. 371.
(*d*) 4 Q. B. 123; See S. C. 3 G. & D. 491.
(*e*) 1 Ld. Raym 719; S. C. 1 Salk. 248; *nom. div.* 12 Mod. 659; 11 Mod. 21.
(*f*) On a subsequent day in the same Term.

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TINDAL, C. J., now delivered the judgment of the Court. (After stating the pleadings, his Lordship proceeded thus:)

On the argument before us, in Easter Term last, it was contended, in support of the demurrer, that a distress taken and abandoned without sale, did not satisfy the rent; and that, consequently, the landlord was not liable to be sued in trover for making a second distress; and that it was not material whether the goods first distrained, were or were not of sufficient value to satisfy the arrears of rent, if the distress were abandoned before sale, and the rent remained due: and *Lear* v. *Edmonds* (*a*); *Lingham* v. *Warren* (*b*); and *Hudd* v. *Ravenor* (*c*), were cited as authorities for these positions. On the other hand, it was contended, that, if a landlord distrain for rent in arrear goods sufficient to satisfy the rent, and wantonly abandon the distress, he cannot lawfully make a second for the same rent, although it may remain due; and that for such second distress he may be sued in trespass or trover; and consequently, if the defendant's rejoinder were good, that could only be on the ground that the sufficiency of the first distress was material, and then the surrejoinder must be good also; and *Anonymous* (*d*), *Smith* v. *Goodwin* (*e*), and *Lear* v. *Caldecott* (*f*), and other cases were relied on.

When the case was argued, it appeared somewhat difficult to reconcile all the decisions that were brought to our notice. We therefore took time to look into them; and now we are of opinion that, upon these pleadings, our judgment must be for the plaintiff.

The replication is a good answer to the plea; for assuming that the rent remained due, not having been satisfied by the first distress (and the case of *Lear* v. *Edmonds* certainly did not go beyond that); still the landlord could not, under the circumstances stated in the replication, make

(*a*) 1 B. & A. 157.
(*b*) 2 B. & B. 36; See S. C. 4 Moore, 409.
(*c*) 2 B. & B. 662; See S. C. 5 Moore, 542.
(*d*) Cro. Eliz. 13.
(*e*) 4 B. & Ad. 413.
(*f*) 4 Q. B. 123.

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a second distress. In *Comyn's Dig.*.tit. "*Distress*," (A. 1.), it is laid down, that "a man cannot take two distresses for the same rent: for, it was his folly that he did not take sufficient at first." In that passage, it is assumed that he might have taken sufficient at first; in this replication it is averred that he did take sufficient at first. Lord Chief Baron *Comyn* refers to *Moore*, 7; *Cro. Eliz.* 13; *Lutw.* 1536. The case in *Moore* is a strong authority for the present plaintiff: it is this—"A man distrained for 10*l.* rent, due at Michaelmas by reservation, certain sheep which were not of the value of 40*s.*, and afterwards distrained for the residue; and the tenant made several replevins. The question was, if he could make an avowry. *Mountague*, *Hinde*, and *Harris*—'You cannot; for, the distress is not good; and it is the folly of the lessor that he would so distrain in the first instance.' *Mountague:* 'Recaption lies for the second distress.' *Brown:*—'If a man be in arrears of his rent at several days, and takes a distress for one day at one time, and for another day at another time, he may: but it is otherwise in the case at bar.'" The case of *Wallis* v. *Savill* (*a*), is an authority for the same position, that a man cannot take a second distress for the same rent, when he might have taken sufficient at first. Nor shall we by acting upon these authorities overrule *Lingham* v. *Warren* or *Hudd* v. *Ravenor*. In the former case, the plaintiff declared in replevin: avowry for rent arrear: plea in bar, that the defendant's testator for the same rent distrained goods and chattels of sufficient value to satisfy it; and, on demurrer, this was held to be a bad plea, on the ground that "there are many cases supposable, in which the taking a sufficient distress might not produce a satisfaction of the rent;" which is undoubtedly true. In *Hudd* v. *Ravenor*, also, the declaration was in replevin, the avowry for rent arrear, and the plea in bar alleged a former distress for the same rent, and that the defendant might

(*a*) 2 Lutw. 1532.

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thereby have paid the arrears of rent, &c., but neglected and omitted so to do, and wrongfully and vexatiously made a second distress for the same rent. That plea was held bad, on the authority of *Lear* v. *Edmonds* (*a*), and *Lingham* v. *Warren* (*b*). The judgment of *Richardson*, J., shews clearly the ground of the decision, viz., that the former distress might have been relinquished in kindness to the tenant, and that no issue could have been taken on the words "neglected and omitted." In the present case, the replication goes much further, and says that the defendant vexatiously and without any cause or excuse, refused to satisfy the arrears of rent by means of the first distress. We do not, therefore, at all impugn these cases by holding that this replication is good.

It remains to be considered whether the rejoinder gives any sufficient answer to the replication. The rejoinder alleges that the goods distrained in the first instance were not of sufficient value to satisfy the arrears, and that the defendant afterwards lawfully abandoned and put an end to that distress. If that can be read so as to make the insufficiency of the goods distrained the ground for abandoning the distress, the averment of insufficiency is material, and the surrejoinder traversing it is good: but, if it cannot be so read, the rejoinder is bad by reason of its not showing any lawful ground for relinquishing the first distress and taking the second, so as to answer the matters alleged in the replication. In either view, therefore, the plaintiff is entitled to judgment.

Judgment for the Plaintiff.

(*a*) 1 B. & A. 157.
(*b*) 2 B. & B. 36; See S. C. 4 Moore, 409.

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1C. i. CB. 974.

THE declaration contained counts for money had and received, and on an account stated. Pleas: first, except as to 1*l.*, nunquam indebitatus. Second, as to 99*l.*, parcel of the monies in the first count, and as to 99*l.*, parcel of the monies in the last count, the same sums being other and different parcels from the aforesaid sum of 1*l.*, parcel, &c., in the first plea mentioned, &c.; that heretofore, and before the having or receiving by the defendant of the said sum of money in the said first count mentioned, and before the said statement of the said account and making of the promise in the declaration mentioned, a certain race, to wit, a horse race, called the Derby stakes, in which divers, to wit, one hundred and fifty-five horses were proposed to run, was about, to wit, on the 22nd of May, 1844, to be run, to wit, upon a certain course, called Epsom Downs, in the county of Surrey; and that heretofore, and before the having or receiving by the defendant of the said sum of money in the first count mentioned, or any part thereof, and before the said statement of the said account, and before the making of the said promise in the said declaration mentioned, to wit, &c., a certain illegal game called a lottery, not authorized by law or act of Parliament, was, contrary to the form of the statutes in such case made and provided, by the defendant set up, kept open, and exposed to be played and drawn at by lot, at and in a certain public house and inn, called or known by the name or sign of the George and Gate, situate and being in the city of London, under and subject to the following, amongst other, terms, rules and regulations, that is to say, that the adventurers and subscribers in and to the said game might consist of as many as, but not more than one hundred and fifty-five members; that each of those adventurers and subscribers should contribute and pay the sum of 1*l.* for his playing in

In an action for money had and received, the defendant pleaded, that a horse-race being about to be run, the plaintiff and one hundred and fifty-four other persons subscribed 1*l.* a piece, which was deposited with the defendant on the terms that the name of each subscriber should be written on a card, and the name of each of the horses written on another, and then the two sets of cards placed respectively in a box, and the cards should be drawn by chance from each of the boxes, and the person whose name should be drawn next after the name of the winning horse, should be entitled to receive 100*l.* from the entire fund: *Held*, an illegal lottery within 10 & 11 Wm. 3, c. 17, and 42 Geo. 3, c. 119, and therefore, that the plaintiff, who was the winner, could not recover the amount from the stakeholder: also, that if not an illegal lottery, it was an illegal bet: also that the plea did not amount to the general issue, but was a good plea in confession and avoidance.

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the said game, and the chance of his drawing a prize therein; that the said contributions and payments should be made to the defendant, who should be the treasurer; that before the running of the said race, the name of each one of the horses entered for the running thereof should be put on a several and separate card, making together one hundred and fifty-five cards, and that all of those cards should afterwards, and before the running of the said race, be placed in a box, and be mixed up together therein in one general mass, and that the name of each one of the said several persons respectively who had become adventurers in and subscribers to the said game, should be put on a several and separate card, making together one hundred and fifty-five cards, and that all of those cards should also, before the running of the said race, be placed in another box, and mixed up together therein in one general mass, and that before the running of the said race, two disinterested persons should draw the said cards out of the said boxes in the following manner, that is to say, that one of those two persons should openly, and as chance should direct, first draw out of the said box containing the cards with the names of the said horses so put thereon, one of those cards, and then the said other of the said two disinterested persons should openly and as chance should direct, then draw out of the said other box containing the cards, with the names of the said adventurers and subscribers put thereon, one of those cards, and that the said two disinterested persons should continue drawing in that manner openly, and as chance should direct, out of the said boxes, the whole of the said cards, and that the person whose name was on the said card, drawn out of the said box containing the cards with the names of the said adventurers immediately succeeding the drawing of the card out of the said box containing the said cards, with the names of the said horses so put thereon as aforesaid, on which card was put the name of the horse that on the running of the said race should be placed as the winner thereof by the person who should be the judge of the said race, should be entitled to receive

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from, and be paid by the defendant, the prize or sum of 100*l.* out of the monies so to be subscribed and deposited with, and paid to the defendant, as treasurer as aforesaid, contrary to the form of the statutes in such case made and provided. And further, that the said illegal game having been so set up, kept open, and exposed to be played and drawn in manner aforesaid, the plaintiff, and divers, to wit, one hundred and fifty-four other persons, afterwards, to wit, on, &c., and before the drawing the said game as hereinafter mentioned, according to the said terms, rules and regulations, became and were respectively adventurers in and subscribers to the said game, to the amount of the said sum of 1*l.* each. And they then, as such adventurers and subscribers, contributed and paid the said sum of 1*l.* each, and the amount of the said sums so contributed and paid by them as aforesaid, came altogether to the sum of 155*l.*, and the same were, in pursuance of the said terms, rules and regulations, on the said days and times, paid to and received by defendant as such treasurer as aforesaid. And further, that afterwards and before the running of the said race, in pursuance of the said terms, rules and regulations, and in furtherance of the said illegal game, the name of each one of the horses entered for the running of the said race was put on a several and separate card, making together one hundred and fifty-five cards; and all of those cards were then placed in a box and mixed up together therein in one general mass, and the name of the plaintiff, and of each one of the said several other persons who had become adventurers in and subscribers to the said game, was then also put on a several and separate card, making together one hundred and fifty-five cards, and that all of those cards were then placed in another box, and mixed up together therein in one general mass. And further, that in pursuance of the said terms, rules and regulations, and in furtherance of the said illegal game, afterwards and before the running of the said race, to wit, on the day and year last aforesaid, two disinterested persons, whose names are to the defendant unknown, then respectively drew the said

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cards respectively out of the said boxes in the manner and form, and according to the terms, rules and regulations aforesaid, that is to say, one of those persons then openly and as chance directed, first drew out of the said box containing the cards with the names of the said horses so put thereon as aforesaid, one of those cards, and the other of the said two persons then openly, and as chance directed, drew out of the said other box containing the cards with the names of the plaintiff, and the said other adventurers in and subscribers to the said game, put therein, one of those cards, and the said two disinterested persons then continued drawing in that manner alternately, openly, and as chance directed, out of the said boxes, the whole of the said cards; and on that occasion one of the said two disinterested persons then drew openly, and as chance directed, out of the said box containing the said cards with the names of the said horses thereon, according to the said terms, rules and regulations, a card with the name of a horse thereon, to wit, a horse called Running Rein, which had been and was proposed and entered to run, and was about to run the said race; and then immediately succeeding such drawing, the said other disinterested person drew out of the said box, containing the cards with the names of the plaintiff and the said other adventurers in and subscribers to the said game, according to the said terms, rules and regulations, a card with the name of the plaintiff thereon, contrary to the form of the statutes in such case made and provided. And the defendant further saith, that afterwards and before the commencement of this suit, to wit, on, &c., the aforesaid race was run; and the said horse called Running Rein, whose name was put on the said card so drawn as aforesaid, was in the running of the said race placed by one Mr. Clark, the person who was the judge of the said race, as the winner thereof; whereby the plaintiff, according to the said terms, rules and regulations of the said illegal game, became and was entitled to receive from, and be paid by the defendant, the said sum of 100*l.* out of the monies so subscribed, and

deposited with and paid to the defendant as aforesaid. And the defendant further saith, that the said sum of 99*l.*, parcel of the monies in the said first count of the declaration mentioned, and to which this plea is pleaded, was and is parcel of the same identical sum of 100*l.* to which the plaintiff became and was entitled under the terms, rules and regulations of the said game, to receive from and be paid by the defendant as aforesaid, out of the monies so subscribed and deposited with and paid to the defendant as aforesaid, and not any other or different sum of money, and that the same consists wholly and exclusively of portions of the contributions and monies so subscribed and paid to and received by the defendant as aforesaid from the said adventurers in and subscribers to the said game, other than the plaintiff; and that the said sum of 99*l.*, so being such parcel as aforesaid, was received and always held by the defendant as such treasurer as aforesaid, and due to the plaintiff, and to which he was entitled as aforesaid, and in manner in this plea mentioned, and not otherwise howsoever, and that the said account in the said last count mentioned to have been stated by and between the plaintiff and the defendant, so far as the same relates to the said sum of 99*l.*, parcel as aforesaid, and to which this plea is pleaded, was stated by and between the plaintiff and defendant, of and concerning the said sum of 99*l.* so received and held by defendant as such treasurer as aforesaid, and not for or concerning, or in respect of any other monies, or any other account whatsoever. Verification.

Thirdly, as to the sum of 1*l.* parcel, &c., payment of that sum into Court.

Demurrer to the second plea, on the ground that the method of determining the right of the said plaintiff to the monies, as to which the said second plea is pleaded, as the same is stated, set forth and described in the said second plea, was not an illegal game, or a lottery not authorized by law; but was in fact a mode of betting by each of the so called adventurers or subscribers in the said second plea mentioned, to a small and legal amount, or stakes in that

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behalf upon the horse-race therein mentioned, being a lawful horse-race: and also that the said second plea amounts to the general issue. Joinder in demurrer.

Byles, Serjt., in support of the demurrer. The defence set up by the plea was insufficient in point of law. The facts disclosed by it did not constitute an illegal transaction either within the statutes against gaming or against lotteries. First, as to the statutes against gaming. In order to constitute gaming within the meaning of the 16 Car. 2, c. 7, it was requisite that it should be either deceitful or excessive. The language of the preamble in sect. 1, and the enacting part of sect. 2, shewed this to be the object of the Legislature. The words of sect. 2 were, if any person "do or shall by any fraud, shift, cousenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, tables, tennis," &c. The section then proceeded to enumerate a number of games, and modes of gambling. But the prior part of the clause shewed that the manner in which that gaming was carried on was the object of prohibition. The provisions of sect. 3 only prohibited the excess of gaming, for it only rendered illegal any play exceeding the sum of 100*l.* at one time or meeting. The provisions of the 16 Car. 2, therefore, could not affect the present case, as there was neither deceit nor excess disclosed. In *Applegarth* v. *Colley* (*a*), the Court of Exchequer, in a judgment given after taking time to consider, in speaking of this statute, said, "the statute of Charles 2, according to our construction of it, does not make illegal all gaming, but such only as is fraudulent or excessive." This was a clear judicial recognition that the view now described was correct. No doubt the amount of 100*l.* was reduced to 10*l.* by 9 Ann. c. 14, s. 2, and the case of *Shillito* v. *Theed* (*b*) decided that a bet exceeding 10*l.* on a legal horse-race was illegal, as the object of the Legislature in legalising horse-races by 13 Geo. 2, c. 19,

(*a*) 10 M. & W. 723.
(*b*) 7 Bing. 405; S. C. 5 M. & P. 303.

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and 18 Geo. 2, c. 34, was to encourage the breed of horses, by affording an adequate object of competition, and not to legalise betting on those races. Here, however, none of the persons who were engaged in the transaction disclosed by the plea, could lose more than 1*l.*, and, therefore, as to amount, the bet was legal. Here the provisions of sect. 5, 9 Ann. c. 14, were inapplicable, for they only prohibited deceitful winning by gaming, but here no deceit was suggested. Was then the present case, one which could be held to come within the meaning of the acts passed against lotteries? The facts which appeared on the face of the plea shewed this to be a sweepstakes and not a lottery. A lottery was an arrangement between the parties, by which less was won than was put in, but here all that was put in might be won. The person setting up this speculation could not gain by it. The Legislature, when it forbad lotteries, clearly meant such lotteries as would be productive of gain to those who established them. Thus the 10 & 11 Wm. 3, c. 17, in the preamble recited, "whereas several evil disposed persons, for divers years last past, have set up many mischievous and unlawful games, called lotteries," &c., "and have thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen," &c. The 12 Geo. 2, c. 28, s. 1, recited the statute of 10 & 11 Wm. 3, c. 17, and then proceeded to make provision for the prevention of such lotteries as would be productive of gain to the keepers of them. Here, however, no gain could be made, and, consequently, the case did not come within the provision of the statutes. It was also to be observed, that here the determination of the bet depended not on the drawing of the names from the place of deposit, but on the event of a legal race. This circumstance took the case out of the operation of the statutes. The plea too was defective in point of form. It stated the supposed illegal arrangement to have been made previous to making the deposit of the money. In effect, therefore, it decided the existence of the contract, and, consequently, the defendant never received

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the money sought to be recovered to the use of the plaintiff. The plea, therefore, amounted to the general issue.

Channell, Serjt., contrà. The contract alleged in this plea was to pay money in pursuance of what amounted to such a lottery as came within the meaning of the 10 & 11 Wm. 3, c. 17, and 42 Geo. 3, c. 119. If the effect which such a lottery as the present was likely to produce was considered, it clearly was the same as appeared by the preamble of the former statute to be contemplated by the Legislature. It was calculated to produce "the ruin and impoverishment of many families," as much as any which that statute was intended to repress; and the latter part of sect. 1 of that statute declared all such lotteries "to be common and public nuisances." Such a lottery was then clearly illegal by the 10 & 11 Wm. 3. Then by 42 Geo. 3, c. 119, s. 1, similar evils to those recited in 10 & 11 Wm. 3, were set forth in the preamble, and it was then provided, "that all such games or lotteries, called Little Goes, shall, from and after the passing of this act, be deemed and are hereby declared common and public nuisances, and against law." The fact of the proprietors gaining or losing by the speculation was not material, as the evil intended to be prevented was the spirit of gambling, which was equally ruinous, whether the owner of the lottery gained or not. Then, if there was any doubt as to its being a lottery within the meaning of the statutes, it was at least an illegal bet, since the successful party would necessarily win more than 10*l.*, and the aggregate of the losing parties to the transaction would lose more. It was, in fact, a bet of 154*l.* by all the contributors except one, with that one. The case of *Shillito* v. *Theed* (*a*), was a clear authority to shew that such a bet was illegal. Then as to the objection to the form of the plea. The case of *Martin* v. *Smith* (*b*), shewed that such a defence could not be available under the plea of non assumpsit. There was here a primâ facie receipt of the

(*a*) 7 Bing. 405; S. C. 5 M. & P. 303.

(*b*) 4 Bing. N. C. 436; S. C. 6 Scott, 268; 6 Dowl. 639.

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money in question to the use of the plaintiff, which could only be met by pleading specially the illegality.

Byles, Serjt., replied.

Cur. adv. vult.

TINDAL, C. J.—This was an action for money had and received: the plea states that a race was about to be run; that an illegal game called a lottery, not authorized by law or act of Parliament, was set up by the defendant for certain subscribers of 1*l.* each, to be paid to the defendant, under regulations which amounted in substance to this, that the subscriber whose name should be drawn out of a box next after the name of the horse was drawn out of another box, which horse should be placed first in the race, should be entitled to receive from the defendant 100*l.* The plea alleges that the subscriptions were paid by the plaintiff and others to the defendant, and that the plaintiff under the regulations became entitled to the sum on demand.

To this plea there was a demurrer, and in support thereof it was contended before us on the part of the plaintiff, that the statutes for the suppression of lotteries were to be restricted in their construction to lotteries of the same description with those mentioned in the respective preambles thereto, or at least to lotteries in which an unfair advantage was taken; and that they did not render illegal the lottery in question, which, as far as appeared, was perfectly fair.

We are of opinion, however, that those statutes are not to be so restricted; but that on the contrary, effect is to be given to the clear words of general prohibition contained in them; and that the lottery in question is illegal.

The 10 & 11 Wm. 3, c. 17, recites the mischiefs from certain lotteries under colour of certain patents and grants; and then enacts, not only that all such lotteries, but also that *all other lotteries* are nuisances, and imposes a penalty on all persons who shall draw at any lottery.

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The 42 Geo. 3, c. 119, recites the mischiefs from certain lotteries called Little Goes, and enacts, that any person who shall keep any place to keep open any lottery called a Little Go, or *any other lottery whatsoever not authorized by act of Parliament*, shall forfeit 500*l.*; and we think it would be in contravention of the express words and clear intention of these statutes, if we held the lottery in question can be excepted from the operation of these very general words.

It was also contended, that the plaintiff's cause of action was not derived from a lottery, but was more properly in the nature of a bet of a less sum than 10*l.* upon a lawful race, and upon that ground was to be considered a lawful wager.

We are of opinion, however, that this ground cannot be maintained; both because it appears in the plea that the plaintiff's cause of action depends entirely on the lottery, and also because even admitting the cause of action to arise from a bet without a lottery, the plaintiff could not by law recover the sum in question, it being, if a bet, a bet by which he will recover the sum of 100*l.* But as we shall have occasion to consider this precise question more fully in the case of *Thorpe* v. *Coleman*, in which we propose to give judgment this day, it will be unnecessary to enlarge upon it at present.

The plea, therefore, as it appears to us, shews that the cause of action was illegal by statute; and the objection taken in argument that the plea amounted to the general issue, and was therefore bad upon that ground, cannot be supported. For as the plea sets up the illegality of the transaction, a special plea is necessary under the New Rules. Consequently, under the New Rules, a special plea was necessary, and cannot be held to amount to the general issue. The defendant, therefore, is entitled to judgment in his favour.

Judgment for the Defendant.

ORDER OF THE JUDGES.

12th June, 1845.

"We have considered the means best calculated to prevent parties from fraudulently obtaining Judges' orders for signing judgment, and recommend that the following precautions be adopted:—

"That all written consents, upon which such orders are obtained, shall be preserved in the chambers of the respective Courts.

"That in actions where the defendant has appeared by attorney, no such order be made, unless the consent of the defendant be given by his attorney or agent.

"That where the defendant has not appeared, or has appeared in person, no such order be made, unless the defendant attend the Judge, and give his consent in person, or unless his written consent be attested by an attorney acting on his behalf; but we think that these precautions are unnecessary, where the defendant is a barrister, conveyancer, special pleader, or attorney.

"We think that Sunday ought to be counted as one of the four days between the delivery of paper books and the day of argument, except it be the last, when it is to be omitted, according to the general rule."

COURT OF EXCHEQUER.

Michaelmas Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

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Where an attorney is retained by a surveyor acting under the Highway Act, the parties who contribute to a rate out of which the attorney's bill is paid, are not "persons liable to pay the bill;" so as to entitle them to apply for its taxation, under the 6 & 7 Vict. c. 73.

THIS was a rule calling on an attorney to shew cause why his bill of costs should not be referred to the Master for taxation. The bill in question was for business done upon the retainer of the surveyor of highways for the township of Rastwick, in the parish of Halifax, in the county of York, in defending certain indictments preferred against the township. The Manchester and Leeds Railway Company and other persons who were a majority of the rate-payers within the township, had taken out a summons to tax the bill, which was heard before *Coleridge*, J., who dismissed the application, on the ground that the 6 & 7 Vict. c. 73, did not apply to the case. The present rule was in consequence obtained.

Martin and *Addison* shewed cause. First, this Court has no jurisdiction to tax a bill for business done on the Crown side of the Court of Queen's Bench. The 37th section of the 6 & 7 Vict. c. 73, enacts, that "upon the application of the party chargeable by such bill,"—"it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other Court of Equity, or

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in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any Court of law or equity, for the Lord High Chancellor or Master of the Rolls, and in case any part of such business shall have been transacted in any other Court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any Judge of either of them, and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon to be taxed and settled by the proper officer of the Court in which such reference shall be made, without any money being brought into Court," &c. The reasonable meaning of the word "respectively" is, that the bill shall be taxed by that particular Court in which the business is done. Perhaps a Judge at Chambers may have a general jurisdiction, but it is not so with the Court. [*Parke*, B.—That section is founded on the 23rd section of the 2 Geo. 2, c. 23, which enacts, "that upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized, unto the said Lord High Chancellor, or the Master of the Rolls, or unto any of the Courts aforesaid, or unto a Judge or Baron of any of the said Courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted," &c. The words "in which the business contained in such bill, or the greatest part thereof in amount and value," are dropped in the statute of Victoria; it therefore seems as if the Legislature meant to give a general jurisdiction to all the Courts; for if they had intended to limit the jurisdiction to the Court in which the business was done, they would have used the same words as in the 2 Geo. 2.] Secondly, the surveyor of the highways, and not the rate-payer, is entitled to apply to have the bill taxed. The 6 & 7 Vict. c. 73, s. 37, requires the bill to be referred for taxation "upon the application of the party chargeable with such

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bill." Though the rate-payers would ultimately defray the costs, they are not the "parties chargeable" with the bill. [*Pollock*, C. B.—Is there any instance of the creditors of a bankrupt requiring the taxation of the bill of the solicitor to the fiat when the assignees have expressed themselves satisfied with it? *Alderson*, B.—How can it be said that the rate-payers are the persons liable to pay the bill? the argument must go to this length, that every person who pays taxes may apply to tax the bill of the solicitor of taxes.]

Knowles and *Hoggins*, in support of the rule. The Court has jurisdiction to refer the bill for taxation. [*Pollock*, C. B.—Assuming that to be so, how are the rate-payers entitled to ask for it?] The object of the Legislature was to increase the facilities for taxing bills. Admitting that the 37th section extends only to applications by the party chargeable, that is, the party legally liable, the 38th section will include this case. That section enacts, "that where any person, not the party chargeable with any such bill within the meaning of the provisions herein-before contained, shall be liable to pay or shall have paid such bill either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid," &c. The persons who form a fund out of which the bill is paid, are parties "liable to pay" within the spirit and equity of that section. The surveyor has no interest in the matter, but the rate-payers have a right to see that the monies levied on them are properly expended. [*Alderson*, B.—You would read the section as if it were thus, "that where any person not the party chargeable

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shall be liable to pay or shall have paid the bill, *or any part thereof.*" *Rolfe*, B.—Would each rate-payer have a right to apply?] The object would be attained by one taxation. This case is not distinguishable from that of a cestui que trust, who is enabled by the 39th section to apply for a taxation of the bill with which his trustee is chargeable. Under the 38th section it has been held that a mortgagor is entitled to an order for taxation of the mortgagee's bill of costs; *In re Carew* (*a*).

POLLOCK, C. B.—The rule must be discharged. As to the question whether this Court has jurisdiction to refer the bill for taxation, I give no opinion. With respect to the other point, it is contended by the counsel who seek to support the rule, that under the 38th or 39th sections we ought to direct this bill to be taxed. The case of *In re Carew*, which has been cited, where an attorney's bill of costs was taxed on the application of a mortgagor, shews that to be one instance in which the 38th section applies. The 39th section applies only to the case of trustees and their cestui que trusts; so that the question really is, whether a person who contributes as a rate-payer to a fund out of which an attorney's bill is to be paid, is, within the 38th section, a person, "not the party chargeable" with the bill, but "liable to pay" such bill to the attorney, or to the party chargeable with it. It appears to me that it cannot be said that such a case is either within the language or the spirit of the section. That it is not within the language appears to me quite plain; for a party who contributes to a fund out of which a bill is to be paid, is not a person chargeable or liable to pay the bill, but only liable to pay a rate out of which perhaps the money is to come by which the bill is paid. So much for the language. As to the spirit of the act, I can hardly imagine that it could have been intended to give to persons having this species of interest a right to have the bill taxed, without some express

(*a*) Coram the Master of the Rolls, December 12, 1844.

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provision to that effect, and some mode in which it was to be carried out with reference to the cases which might arise. In truth, there are other modes provided by which these rate-payers may be protected; namely, by application to the magistrates in sessions, who have to allow the accounts of the surveyor. If the magistrates violate that duty, it is not to be remedied by this Court granting a taxation of the bill. For these reasons I concur in opinion with my Brother *Coleridge*.

PARKE, B.—I agree with the view taken by the Lord Chief Baron, and do not think it necessary to pronounce any decision whether under the 37th section this Court has power to order the bill to be taxed; but I am strongly disposed to think that a common authority is given to all the Courts. As to the other point, it seems that the fund in the hands of the surveyor consists partly of the contributions of the rate-payers already made, and partly of rates which he is empowered to make, under the 5 & 6 Wm. 4, c. 50, s. 27; and it appears to me, that upon the proper construction of the 6 & 7 Vict. c. 73, s. 38, a party liable to contribute to a fund out of which an attorney's bill is to be paid, is not a person "liable to pay" the bill, and that on that ground the rule must be discharged.

ALDERSON, B.—I am of the same opinion. A rate-payer is not one of those persons who is liable to pay, or who has paid the bill to the attorney or surveyor. That he is not liable to the attorney, is too clear for argument. Nor is he liable to the surveyor, unless the bill has been allowed by the justices in session. The parties are not without remedy, for if they have any real ground for taxation, it is their duty to apply to the magistrates at the time when the surveyor is passing his accounts; and, if a proper case were made out, the magistrates would neglect their duty if they allowed the accounts to pass, unless the surveyor undertook to have the bill taxed,

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ROLFE, B.—I am of the same opinion. All that my attention is at present directed to is the 27th section of the Highway Act, (5 & 6 Wm. 4, c. 50), which enables the surveyor to make a rate, which, with other small sums, form the fund over which he has a control. The suggestion of counsel is, that the rate-payers are interested in all payments made by the surveyor. But the case is provided for by the 44th section, which requires "that within fourteen days after the election or appointment of surveyor as herein directed, the accounts as aforesaid made in writing, and signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, of all monies received and disbursed by virtue of this act, ending on the day of the election or appointment of surveyor, shall be made up, balanced, and laid before the parishioners in vestry assembled, who may, if they think fit, order an abstract thereof to be printed and published; and within one calendar month after the election or appointment of surveyor as herein directed, the said accounts shall be signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, and laid before the justices of the peace at a special session for the highways, holden at the place nearest to the parish or district for which such surveyor shall have been appointed; and such justices are hereby authorized and required to examine him as to the truth of the said accounts, or of any charge contained therein: provided always, that if any person chargeable to the rate authorized to be made by this act has any complaint against such accounts, or the application of the monies received by the said surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts as aforesaid; and the said justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet." Now, suppose a proper case made out, shewing that the surveyor is either about to pay or has paid the bill,

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without submitting it to proper taxation, the consequence would be, that the justices would not pass the accounts until the surveyor had got the bill taxed. If we were to hold that parties thus interested were entitled to apply to have the bill taxed, it would lead to difficulties insurmountable; because, as my Brother *Parke* observed, the fund in the surveyor's hands is not made up of the contributions of the current year alone, but also of the balance of the preceding year, and, for aught we know, that balance may be sufficient to pay the bill.

Rule discharged, with costs.

S.C. 14 M.W. 800

SLANEY *v.* SIDNEY and Others.

The first section of the Interpleader Act does not apply to the case of a party sued by one person for the price of goods, and by another for the goods themselves.

ATHERTON, on behalf of the defendants, moved for a rule under the first section of the Interpleader Act, (1 & 2 Wm. 4, c. 58), and also to stay proceedings in this cause, and in another action brought by other plaintiffs against the same defendants. It appeared from the affidavits that the defendants had agreed to purchase certain chests of tea, the warrants for which were made out in the name of the plaintiff in this action. Before the defendants paid for the tea, they were served with a notice from the plaintiffs in the other action, that the tea warrants belonged to them, and were improperly obtained from their possession, and requiring the defendants not to pay the price to the vendor. Subsequently the two actions were commenced, the one by the present plaintiff in debt for the price of the tea, and the other by the claimants in trover, for the conversion of the warrants. It was submitted, that as the defendants were willing to pay the money into Court, they were entitled to relief under the Interpleader Act. [*Pollock*, C. B.—This subject was partly discussed in *Farr* v. *Ward* (*a*).

(*a*) 2 M. & W. 844.

Martin, amicus curiæ, mentioned the case of *Crawshay* v. *Thornton* (*a*).

POLLOCK, C. B.—In *James* v. *Pritchard* (*b*), a rule was granted under circumstances not very dissimilar in principle from the present case. There the plaintiff sold to the defendant a rick of hay which had belonged to a deceased person. Administration of the effects of the deceased was afterwards granted to a third party, who claimed from the defendant the price of the hay. This Court having granted a rule, decided that the case did not come within the Interpleader Act. In the present case, I was at first disposed to take the view which the Court there took when they granted the rule; but I concur with the rest of the Court in thinking that the case is not within the statute.

PARKE, B.—Here the parties cannot interplead, for they do not claim the same thing; the one seeks to have the benefit of a contract, and the other the subject-matter of it. The plaintiff in this action claims the price agreed to be paid, which may be ten times the value of the goods, while the plaintiffs in the other action only claim their real value. A person may make an imprudent bargain, and agree to pay 100*l.* for what is not really worth 20*l.*

ALDERSON, B.—The Interpleader Act was intended as a substitute for the old mode of obtaining relief by bill in equity. Now, it is perfectly clear, that in a case like this, there could have been no interpleader in equity.

Rule refused.

(*a*) 2 Myl. & Cr. 1.
(*b*) 8 Dowl. 890; S. C. 7 M. & W. 216.

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J.C. 14 Jn W. 774:

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Trespass will not lie against a plaintiff who, without notice, takes a defendant in execution for a debt in respect of which the latter has been discharged under the Irish Insolvent Act. But if the plaintiff maliciously sue out the writ, he is liable to an action on the case.

TRESPASS for assault and false imprisonment.

Plea of justification under a writ of capias ad satisfaciendum, issued on a judgment obtained by the now defendant against the now plaintiff.

Replication: that after the recovering of the said judgment, and before the said time when, &c., the plaintiff was a prisoner in actual custody within the walls of a certain prison in that part of the United Kingdom of Great Britain and Ireland called Ireland, to wit, in the public gaol of the county of Antrim, upon process for and by reason of a certain debt and costs at the suit of one J. M., and being such prisoner the now plaintiff did, within fourteen days next after the commencement of the said actual custody of her the now plaintiff, to wit, on, &c., duly and according to the direction and provisions of a certain statute made and passed, &c., intituled, "An Act to continue and amend the laws for the relief of insolvent debtors in Ireland," apply by petition in a summary way to the Court for the Relief of Insolvent Debtors in Ireland, for her discharge from such custody according to the provisions of the said act, which said petition was then duly subscribed by her, the now plaintiff, and contained all such matters and things as are required by the said act, and was forthwith, to wit, on, &c., filed in the said Court pursuant to the directions in the said act contained: and the plaintiff further says, that upon the filing by her of the said petition, and before the said time when, &c., to wit, on, &c., the said Court by a certain order then made by the said Court, in pursuance of and according to the provisions of the said act of Parliament, ordered that all the real and personal estate and effects of the now plaintiff, both within this realm and abroad, except the wearing apparel, bedding, and other necessaries of the now plaintiff, and the working tools and implements of the now plaintiff, not exceeding in the whole

the value of 15*l.*, and all the future estate, right, title, interest, and trust of the now plaintiff, in or to any real or personal estate and effects within the realm or abroad, which the now plaintiff might purchase, or which might revert, descend, or be devised or bequeathed, or come to her before she should become entitled to her final discharge in pursuance of the said act, and according to the adjudication to be thereafter made in that behalf, or in case the now plaintiff should obtain her full discharge from custody without any adjudication being made by the said Court there, before the now plaintiff should be fully discharged from custody; and all debts due or growing due to the now plaintiff, or to be due to her before such discharge as aforesaid, should be vested in one J. S., who was then the provisional assignee of the said Court, which said order was then, to wit, on, &c., duly entered of record in the said Court, as by the said order, reference being thereunto had, will more fully appear, and notice of the said order was, to wit, on, &c., duly published according to the directions of the said Court. And the plaintiff further saith, that after the making of the said vesting order, and before the said time when, &c., to wit, on, &c., and within the space of fourteen days next after the said vesting order had been so made as aforesaid, the now plaintiff did deliver into the said Court for the Relief of Insolvent Debtors in Ireland, a schedule containing a full and fair description of the now plaintiff as to her name, trade, and profession, together with her last usual place of abode, and the places where she had resided during the times her debts were contracted, and also a full and true description of all debts due or growing due from her at the time of making such order, and of all and every person and persons to whom she was then indebted, or who to her knowledge or belief claimed to be her creditors, together with the nature and amount of such debts respectively, distinguishing such as were admitted from such as were disputed by her the now plaintiff, and

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also a full, true, and perfect account of all her estate and effects whatsoever, and containing all other matters and things which in and by the said statute were required to be inserted in the said schedule. And the plaintiff further says, that the name of the now defendant was duly inserted in the said schedule as a creditor of her the now plaintiff, together with a full and true description of the said judgment recovered by the now defendant against the now plaintiff, in the said Court of our said Lady the Queen, before the Queen herself in the said plea mentioned, and of the debt and sums of money due from the now plaintiff to the now defendant, under or by virtue of the same judgment, and that the said schedule was, to wit, on, &c., subscribed by the now plaintiff, and forthwith filed in the said Court, together with all books, papers, deeds, and writings, in any way relating to the estate or effects of the now plaintiff, in her possession, or under her custody or control. And the plaintiff further says, that after the said schedule had been so filed as aforesaid, the said Court for the Relief of Insolvent Debtors in Ireland did forthwith, to wit, on, &c., appoint a certain time within four calendar months from the date of such appointment, to wit, on, &c., and a certain place, to wit, the Court House at Carrickfergus, being the assize town of the county where the said gaol in which the plaintiff was so confined as aforesaid is situate, to be the time and place for the plaintiff to be brought before W. H. Curran, Esq., being one of the commissioners of the said Court, to be dealt with according to the provisions of the said act, and that the said Court for the Relief of Insolvent Debtors in Ireland, to wit, then caused due notice of the said vesting order having been so made as aforesaid, and of the said schedule having been so filed by the now plaintiff as aforesaid, in the said Court, and of the said time and place so as aforesaid appointed for the now plaintiff as such prisoner as aforesaid, to be brought up as hereinbefore mentioned before the said commissioner of the said Court,

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to be given, and the same was then duly given to the defendant by the means appointed by the said Court, to wit, by being sent by post to the now defendant, directed to him the now defendant at his then residence, and was also duly given to the said detaining creditor, and to the other creditors named in the said schedule of the said now plaintiff, and was also, to wit, then duly inserted in the Dublin Gazette, and in divers, to wit, two other newspapers, by order of the said Court for the Relief of Insolvent Debtors in Ireland. And the plaintiff further saith, that afterwards and at a reasonable time in that behalf before the said time so as aforesaid appointed for the now plaintiff to be brought up before the said commissioner, to wit, on, &c., the said notice so sent by post to the now defendant, was duly received by him the now defendant; and that afterwards, to wit, at the time and place so as aforesaid appointed in that behalf, the now plaintiff as such prisoner as aforesaid, was brought up for her examination before the said commissioner, and was duly examined by the said commissioner, and duly sworn to the truth of the said schedule; and the now plaintiff then duly executed a warrant of attorney to authorize the entering up a judgment against her the now plaintiff in one of the superior Courts at Dublin, to wit, the Court of, &c., in the name of the provisional assignee of the said Court for the Relief of Insolvent Debtors in Ireland, for the amount of debts stated in the said schedule of the now plaintiff, to be due or claimed to be due from the said now plaintiff; and that afterwards and before the said time when, &c., to wit, on, &c., by a certain order of adjudication then made by the said W. H. Curran, &c., so being such commissioner as aforesaid, under and by virtue of the said act, upon hearing the matters of the schedule of the plaintiff, and upon examination made into the same, and upon the plaintiff swearing to the truth of the same, and executing a warrant of attorney in pursuance of the said act, it was adjudged and ordered that the now plaintiff should be discharged

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from custody and entitled to the benefit of the said act forthwith, as to the several debts and sums of money due or claimed to be due on the 22nd day of May, A.D. 1844, being the time of making the order vesting the estate and effects of the now plaintiff pursuant to the said statute in that behalf, from the now plaintiff to the several persons named in the schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons gave credit to the now plaintiff before the said time of making such vesting order, and which were not then payable; as to the future claims of any surety or bail for the now plaintiff named in the said schedule, so made as aforesaid, as a contingent creditor of the now plaintiff; and as to the claims of all other persons not then known to the now plaintiff, who might be indorsees or holders of any negotiable security set forth in the said schedule so sworn as aforesaid. And the plaintiff further says, that she was, to wit, on, &c., and before the said time when, &c., by virtue of the said order of adjudication of the said Court, so made as aforesaid, discharged out of the said custody in Ireland aforesaid. And the plaintiff further saith, that the said G. H., so being such sheriff as in the said plea mentioned, took and arrested the now plaintiff at the said time when, &c., as in the said plea mentioned, at the request and by the direction of the now defendant, after she the now plaintiff had so as aforesaid become entitled to the benefit of the said act, by the said adjudication with respect to the said debt, damages, costs, and charges, in the said plea mentioned, and with respect to the said judgment for the same debt, damages, costs, and charges, in the said Court of our said Lady the Queen, &c. And the plaintiff further says, that afterwards and during the time that she the now plaintiff was so as aforesaid a prisoner in the custody of the said G. H., at the suit of the now defendant, to wit, on, &c., by a certain order then made in the said action at the suit of the now defendant against the now plaintiff, by the Honourable Mr. Justice *Maule*, then being

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a justice of the Court of our Lady the Queen, before the justices of the Bench at Westminster, and entitled to act as a Judge of the said Court of our Lady the Queen, before the Queen herself, under and by virtue of the statute in such case made and provided, being the Court out of which the said writ of capias ad satisfaciendum in the said plea mentioned issued, it was ordered, upon hearing the attorneys or agents on the part of the now defendant and the now plaintiff, and upon reading the affidavit of, &c., that the now plaintiff should be discharged out of the custody of the said sheriff, as to the said action, she having previously to her arrest been discharged under the provisions of the said first mentioned act of Parliament, as to the judgment debt and costs in the said action. And the plaintiff further says, that afterwards and before the commencement of this suit, to wit, &c., the plaintiff was duly discharged from the said custody by virtue of the said last mentioned order. Verification.

General demurrer and joinder.

E. V. Williams, in support of the demurrer. The point attempted to be raised by this demurrer, is, whether to a justification in trespass under a ca. sa. out of one of the Courts at Westminster, it is a good replication to say, that the party was discharged from the judgment debt by the Court for the relief of insolvent debtors in Ireland. It is conceived, however, that it will not be necessary to argue that question, for even supposing that the party had taken the benefit of the English Insolvent Act, a ca. sa., which was warranted by the judgment, would be a sufficient justification to all parties acting under it. While the writ is in force, the defendant cannot be liable in trespass, though if he had maliciously sued it out, he might be liable in case. *Tarlton* v. *Fisher* (*a*), decided that a sheriff is not liable to an action for false imprisonment, for arresting a

(*a*) 2 Doug. 671.

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certificated bankrupt, a peer, or an insolvent debtor. [*Pollock*, C. B.—There was a case before us in last Term, *Yearsley* v. *Heane and Another* (*a*), in which the question arose, whether upon the construction of the 5 & 6 Vict. c. 116, an insolvent who had obtained his discharge from arrest under that act could bring an action against the party subsequently arresting him. *Parke*, B.—Under the old law the remedy would have been by auditâ querelâ. In this case the Judge only directs the party to be discharged, he does not set aside the writ as irregular.]

The Court then called on

Martin, contrà. The question turns upon the meaning of the Irish Insolvent Act, 3 & 4 Vict. c. 107. The 81st section enacts, "that no person who shall have so become entitled to the benefit of this act by any such adjudication as aforesaid shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her according to this act, unless by the special order of the said Court, as herein-before mentioned, or for or by reason of any debt or sum of money or costs with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; but that upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any Judge of the Court from which any writ or process shall have issued in respect thereof, and such Judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as herein-before mentioned, to release such prisoner from custody, unless it shall appear to such Judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by this act required, being given to

(*a*) See note A. at the end of this case.

or acknowledged by the plaintiff in such writ or process, or being by him dispensed with by the acceptance of a dividend under this act, or otherwise; and at the same time, if such Judge shall in his discretion think fit, it shall be lawful for him to order such plaintiff, or any person or persons suing out such writ or process, to pay such prisoner the costs which he shall have incurred on such occasion, or so much thereof as to such Judge shall seem just and reasonable, such prisoner, in case of his or her having been arrested upon mesne process by special order as hereinbefore mentioned, causing a common appearance to be entered for him in such action or suit." The 82nd section enacts, "that after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid no writ of capias ad satisfaciendum, fieri facias, or other writ of execution against the body, goods, or chattels of such prisoner shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act, and by special order of the said Court obtained for that purpose as hereinbefore mentioned; and that if any suit or action shall be brought, or any scire facias be issued, against any such person, his heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against or any statute or recognizance acknowledged by such person for the same, except as aforesaid, it shall be lawful for such person, his heirs, executors, or administrators, to plead generally that such person was duly discharged according to this act by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially, whereto the plaintiff or plaintiffs shall or may reply generally, and deny the matters pleaded as aforesaid, or reply any other matter or

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thing which may shew the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded this act, and a discharge by virtue thereof, specially." As the statute declares that "no writ of capias ad satisfaciendum shall issue," the act of issuing it in direct violation of the statute, is an illegal act, and the writ itself is void. This case is distinguishable from *Whitworth* v. *Clifton* (*a*), and *Barker* v. *St. Quintin* (*b*), inasmuch as a sheriff is bound to obey the order of the Court, and may therefore justify under a void writ, but it is different with respect to the plaintiff who sues out process at his peril. In *Parsons* v. *Loyd* (*c*), *Gould*, J., says, "If a man be unjustly imprisoned, it would be very strange indeed, if the law did not give him an action for false imprisonment." [*Pollock*, C. B.—That case, when examined, only comes to this, that a plaintiff who causes the defendant to be arrested under a void writ, which is the same as no writ at all, is liable in trespass.] There is no distinction between a void writ, and a writ prohibited by act of Parliament. *Barker* v. *Braham* (*d*), decided that trespass would lie against an attorney as well (as against his client) who sues out at the suit of the client an illegal writ of ca. sa.: there *De Grey*, C. J., says, "We are all of opinion that trespass vi et armis, well lies against both the defendants. It is certain that the plaintiff hath received great injury in her person and liberty, because she hath been imprisoned by and under colour of a capias ad satisfaciendum illegally taken out against her, which is the same thing as if such writ had never been taken out at all." A party who sues out a writ in defiance of an act of Parliament, is in the same situation as if he had acted without a writ. [*Parke*, B.—Suppose the plaintiff wished

(*a*) 1 M. & Rob. 531.
(*b*) *Ante*, vol. 1, p. 542; S. C. 12 M. & W. 441.
(*c*) 3 Wils. 341.
(*d*) Id. 368.

to question the propriety of the defendant's discharge, for instance, whether the debt was such a one as to be barred, is the plaintiff to be a trespasser or not according as the Court shall decide?] After the decision of the Court of Error in *Magnay* v. *Burt* (*a*), it is clear that under circumstances like the present, case would not lie. [*Parke*, B. —That was a case of privilege, in which the arrest is only wrongful sub modo.] In *Tarlton* v. *Fisher* (*b*), *Willes*, J., draws a distinction between illegal arrests and arrests against privilege. [*Parke*, B.—The statute contains no provision for relieving the insolvent from a fieri facias; and the question is, whether it means anything more than that if the party be arrested, he shall obtain his discharge by applying to a Judge?] When the Legislature provided a means of discharge from imprisonment, it could never have intended to deprive the party of his remedy for the wrong done by the imprisonment.

E. V. Williams in reply. The 82nd section has no application to this case, but relates to an execution issued on a judgment recovered in respect of a sum mentioned in the schedule, and not to a ca. sa. on a judgment entered in the schedule. That section was introduced in consequence of the case of *Sweenie* v. *Sharp* (*c*), in which it was held, that a cognovit given by an insolvent after his discharge, upon proceedings commenced before, constituted a new promise, upon which he became liable notwithstanding his discharge. (He was then stopped by the Court.)

POLLOCK, C. B.—There must be judgment for the defendant. This is an action for trespass and false imprisonment: the defendant justifies under a writ of capias ad satisfaciendum, to which the plaintiff replies his discharge under the act for the relief of insolvent debtors

(*a*) 5 Q. B. 381.
(*b*) 2 Doug. 671.
(*c*) 4 Bing. 37; See S. C. 12 Moore, 163.

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in Ireland. The question is, whether the language of the Irish Insolvent Act, entitles the plaintiff to maintain trespass? It has been long established, that an exemption from arrest will not entitle the party privileged to maintain an action of trespass, if that exemption be violated. *Tarlton* v. *Fisher* (*a*) clearly establishes that doctrine, and it has been recognised and confirmed in many cases. Subsequently various parties have been exempted from arrest, by particular statutes, such as the Lords' Act, and the Bankrupt Acts, I think even so far back as the 5 Geo. 2, c. 52. The language of that act is certainly not so strong as the modern statutes; but it has always been held that a bankrupt or insolvent must take the benefit of his exemption by application to the Court or a Judge. There is likewise a case lately decided in this Court, *Yearsley* v. *Heane and Another* (*b*), where, if I remember rightly, we held that a party who had applied to a commissioner of bankruptcy, under the 5 & 6 Vict. c. 116, and obtained a final order for protection from arrest, could not maintain trespass if arrested; but ought to apply to a Court of competent jurisdiction for his discharge. With respect to *Parsons* v. *Loyd* (*c*), the writ was absolutely void, from some matter apparent on the face of it, and which was within the knowledge of the party issuing the writ. In the present case it is pressed upon us, that the issuing of the writ was prohibited by act of Parliament; but that makes no difference; it only raises the question, not whether the writ is absolutely void, but in what way the party grieved is to take advantage of the irregularity, or it may be, the illegality of issuing it. It appears to me that the Insolvent Act does not at all vary the general rule, and it would be productive of great inconvenience and mischief if a party were liable to an action of trespass for issuing a writ under circumstances which gave him no notice that he was not entitled to issue

(*a*) 2 Doug. 671.

(*b*) See note A. at the end of this case.

(*c*) 3 Wils. 341.

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it. *The* argument would go to this extent, that if a creditor without knowledge of the debtor's discharge, availed himself of a judgment, he would be liable to an action of trespass, because the defendant had taken the benefit of the Insolvent Act. The same doctrine applies to the present as to all similar cases, and the plaintiff is not a trespasser for issuing the writ. There is no hardship in our thus deciding, for it is clearly laid down, that if a party knowingly, and in order to oppress, maliciously sue out the writ, he will be liable in an action on the case. Here, however, the question is, whether trespass will lie; it clearly will not, and there must be judgment for the defendant?

PARKE, B.—I am of the same opinion. The question turns upon the true construction of the act of Parliament, what is meant by the 81st section, which says, that "no person entitled to be discharged under that act shall be imprisoned, except by order of the Court, or under certain circumstances," and the expression used in the 82nd section "that no capias ad satisfaciendum shall issue against him." Is the meaning of the Legislature that the act of issuing the writ shall be absolutely void, and the writ itself as so much waste paper, and that the arrest shall be an illegal act, so as to warrant an action of trespass; or does the Legislature mean that it shall be irregular only? It is clear to me that the Legislature never contemplated the former alternative. Perhaps the statute is not correctly worded, but when it is said that "no capias ad satisfaciendum shall issue," it means that the plaintiff ought not to issue it. I agree with the Lord Chief Baron that the effect of putting another construction on the act would lead to such hardship that we ought never to adopt it; for a plaintiff would then be liable to an action of trespass, although he might not know of the defendant's discharge. The subsequent part of the 82nd section extends the same provision to a capias ad satisfaciendum issued on a judgment obtained in a fresh

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action against the insolvent, and the consequence of applying the argument on behalf of the plaintiff to another action would be so absurd that we cannot adopt it; for it would make a party a trespasser though the former judgment may have been pleaded, and the plaintiff's right to recover affirmed by the House of Lords. It by no means follows, that if the 82nd section stood alone, its declaration that "no capias ad satisfaciendum shall issue," would render the writ null and void; and the consequences of putting the construction contended for, namely, that the writ is void, are so serious, that it is impossible to admit it. All that the Legislature means is, that the writ should not be issued, giving the party his remedy by auditâ querelâ, or application to the Court, which is a substitute for it.

ALDERSON, B.—The question is, whether the words "no writ of capias ad satisfaciendum shall issue" are to be taken as meaning that the writ, if issued, shall be void and a nullity, or merely irregular. If void and a nullity, an action of trespass would lie in all cases, even where the plaintiff means to dispute the validity of the discharge, and even where he has succeeded in making out that the discharge was invalid. If an absurdity arises in construing the statute in a literal way, is there any way of construing it so as to get rid of the absurdity? There certainly is. The statute means, that if the writ does issue, the insolvent shall be discharged by due course of law, that is, by application to a Judge. Taking both sections together, that is the only reasonable construction which can be put on the statute.

ROLFE, B., concurred.

Judgment for Defendant.

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Note A.

(*This case was decided in Trinity Term.*)

YEARSLEY *v.* HEANE and HUDSON.

Trespass will not lie against a plaintiff or his attorney for suing out execution, and arresting thereon a defendant who has obtained an order for protection from process under the 5 & 6 Vict. c. 116.

TRESPASS for false imprisonment. Pleas: first, not guilty by both defendants: secondly, a justification by the defendant Heane under a ca. sa. issued on a judgment recovered by him against the now plaintiff: thirdly, a justification under the same writ by the defendant Hudson, as the attorney of Heane.

The plaintiff replied severally to the second and third pleas, by setting out the proceedings upon a petition presented by him to the Court of Bankruptcy under the 5 & 6 Vict. c. 116, and averred the making of a final order for protection and distribution under the provisions of that act, and that the defendants had notice of the premises.

The defendants rejoined separately to each of these replications, that they had not before or at the time of the execution of the said writ of ca. sa., notice that the said final order had been made.

At the trial before *Pollock*, C. B., a verdict was found for the defendant Heane, and against the defendant Hudson, on the plea of not guilty; the learned Judge being of opinion that there was no evidence against Heane, as the arrest took place without his knowledge, and by order of Hudson, as his attorney. It appeared that Hudson had become the attorney of Heane at a time subsequent to the proceedings in the Court of Bankruptcy. On the other issues there was no proof of notice in fact, and a verdict was found for both the defendants.

Alexander obtained a rule nisi on behalf of the plaintiff, to enter judgment non obstante veredicto on the second and third issues; and *Talfourd*, Serjt., obtained leave, on shewing cause, to argue in arrest of judgment.

Talfourd, Serjt. First, trespass is not maintainable, the arrest having been made under a writ of ca. sa. lawfully issued, and still in force; *Tarlton* v. *Fisher*, (2 Doug. 671.) If any action would lie, the proper form is case, not trespass; *Cameron* v. *Lightfoot*, (2 W. Bl. 1190;) *Stokes* v. *White*, (1 C., M. & R. 223; S. C. 2 Dowl. 703.) Secondly, the defendants are not liable unless they had express notice of the final order for protection. There is nothing in the 5 & 6 Vict. c. 116, to create a liability where it did not exist under former Bankrupt or Insolvent Acts. The 4th section of that act enables the commissioner to cause notice to be given that he will on a certain day, unless cause be shewn to the contrary, proceed to make a final order for the

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protection of the petitioner from all process. The 7 & 8 Vict. c. 96, s. 29, gives the commissioner power to discharge a petitioner who shall be taken or detained under process for a debt in respect of which he is protected by the final order. In *Marsh* v. *Woolley*, (*ante*, vol. 1, p. 84; S. C. 6 Scott, N. R. 555; 5 M. & G. 675,) the Court of Common Pleas discharged a person having an interim order for protection, but refused to make the sheriff or the plaintiff pay the costs of the application.

Alexander and *Richards* in support of the rule, were requested by the Court to confine themselves to the first point. Although it has never been decided that trespass will lie under circumstances like the present, yet as the object of the Legislature was to afford protection to persons who have become indebted without fraud or negligence, it would seem to follow, that if illegally arrested, they might maintain trespass. This view is supported by the preamble, and the 4th section of the 5 & 6 Vict. c. 116. *Tarlton* v. *Fisher*, (2 Doug. 671,) only decides that no action lies against the sheriff; but unless an action be maintainable against the party who issues the execution, there would be a wrong without a remedy.

POLLOCK, C. B.—The jury having found that the defendant Heane was not guilty, inasmuch as he took no part in the arrest, the case remains against Hudson, who justifies as the attorney suing out the execution. I own I should have paused before I decided that the act of Parliament makes the proceedings themselves notice of the same not only to the persons who were creditors, but also to a person in the situation of Hudson, who was not even the attorney of the other defendant at the time of the proceedings in the Court of Bankruptcy. That point, however, has not been fully argued, and it is unnecessary to decide it. The real question is, whether an action of trespass will lie at the suit of a party who having an order of protection under the 5 & 6 Vict. c. 116, is arrested by virtue of a ca. sa. The application to enter judgment for the plaintiff non obstante veredicto, certainly proceeds upon the ground that the statute makes the proceedings themselves notice, and that a notice *in fact* was unnecessary; but a previous question arises, whether the replication, which admits the issuing of the ca. sa., be good. I am of opinion that it is not. The point has been substantially decided in *Tarlton* v. *Fisher* and the other cases cited. It is not necessary to advert to the distinction between this case and that of the privilege of the Crown and its servants, or of ambassadors, or peers or members of the House of Commons: it is sufficient to say that no case can be found in any Court in which a party having an order of protection has been held entitled to maintain trespass by reason of his arrest, under a writ issued upon a regular judgment. In *Lloyd* v. *Wood*, (5 A. & E. 228; S. C. 6 N. & M. 822,) the action was brought in case, and some of the Judges

doubted whether it could be maintained at all. Nobody ever suggested that trespass would lie; on the contrary, from the course of the argument, and what was said by the Judges, it seems to have been the opinion of the Court that it would not; and I can say, that for above thirty years such has been the universal impression in Westminster Hall. The writ of ca. sa. is therefore an answer to the action, and the replication is bad. It is said to be a great hardship, but there are many instances of that. In giving this protection did the Legislature mean more than this, that if the party were arrested he might be discharged; or did the Legislature mean to confer a benefit beyond that, and give him a right to claim damages? I think it did not, and that we shall therefore carry out the intention of the Legislature by discharging the rule.

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ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

GASKELL *v.* SEFTON the Younger.

14. In W. 802.

A sheriff having seized certain horses which were claimed by a third party, an interpleader order was made, that on payment of a sum of money into Court, and "possession money" from the date of the order, the sheriff should withdraw from possession:
Held, that the sheriff had no right to detain the horses for the expense of their keep; but should have applied to the Judge to allow those expenses.

THIS was a rule calling on one Webster, an officer of the sheriff of Westmoreland, to shew cause why he should not refund to J. Sefton, the elder, the sum of three guineas extorted from him under colour of a writ of fieri facias.

It appeared that a fieri facias had issued against the goods of the defendant Sefton, the younger, by virtue of which writ the sheriff seized (amongst other things) three horses. Sefton, the elder, set up a claim to the property seized, upon which the sheriff applied for relief under the Interpleader Act, and on the 27th of August, *Platt*, B., ordered "that upon payment of 30*l.* into Court by Sefton, the elder, within fourteen days from the date of the order, or upon his giving security for payment of the same, and upon payment to the sheriff of the possession money from the date of the order, the sheriff should withdraw from possession of the goods: that the plaintiff should pay to the

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sheriff the possession money from the time of the seizure of the goods up to the day of the date of the order, and that Sefton, the elder, should pay the possession money from the day of the date of the order until the said sum of 30*l.* was paid by him into Court, or security given; and in default thereof the sheriff to be at liberty to sell the goods, and pay the proceeds of the sale into Court: and that a feigned issue be tried at the next assizes for Westmoreland between Sefton, the elder, and the plaintiff in the original action, 'as to whether the goods when seized were the goods of the claimant.'" On the 1st of September, Sefton, the elder, paid 30*l.* into Court pursuant to the above order, but the sheriff's officer refused to deliver up possession of the goods, unless he were paid in addition to possession money the sum of three guineas, which he charged for the keep of the horses from the 27th of August. The feigned issue had not been tried.

Temple shewed cause. A sheriff's officer is entitled to the costs of keeping cattle taken in execution. [*Alderson*, B. —If he take the goods of a third party, what claim can the officer have for their keep?] It is not yet determined to whom the goods belong. [*Pollock*, C. B.—The sheriff is ordered to deliver back the goods to the claimant on payment of possession money, and he must do so.] He has a lien upon the horses to the amount of his costs for their keep.

Atkinson, in support of the rule. The term "possession money" has a certain definite meaning, and applies solely to the expense of the man in possession. That is evident from the items allowed in respect thereof by the table of fees made in pursuance of the 1 Vict. c. 55. [*Pollock*, C. B. —The Master reports to us that on taxation he should have allowed this charge under the following head in the table of fees: "For any duty not herein provided for, such sum as

one of the Masters of the Courts of Queen's Bench or Exchequer, or one of the prothonotaries of the Court of Common Pleas, may upon special application allow."] The Master is in error as to the meaning of the rule, which is, that such expenses might be allowed upon *special application.* Ex mero motu, the Master has no authority to allow them. Unless the officer be entitled to these costs under the table of fees, he has no right to claim them. The mere act of seizure does not divest the property. It is true that by seizure the sheriff obtains such a *special* property in the goods as to enable him to maintain trespass or trover, but until sale the *general* property remains as before. The sheriff was under no obligation to feed the horses, and if they had died for want of food he would not have been liable. The case is analogous to that of a distress before the 5 & 6 Wm. 4, c. 59.

POLLOCK, C. B.—The Court will ultimately do justice between the parties when the feigned issue is disposed of. In the mean time, the question is, whether the sheriff, who has been ordered to give back the horses on receiving "possession money," has a right to make an additional charge for their keep? I think he has not. When the parties were before the Judge, the sheriff might have applied for the expense of keeping the horses, and if the Judge had thought that it ought to have been allowed, he would have made an order accordingly.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

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8 C. 14 M W. 808.

PERKINS *v.* ADCOCK.

The Court required a plaintiff, who, it was alleged, was in insolvent circumstances, to give security for costs; where it appeared that he had assigned, amongst other property, the debt for which the action was brought to two of his creditors in trust for the rest.

P. *M'MAHON* had obtained a rule, calling on the plaintiff to shew cause why he should not give security for costs. The affidavits in support of the application stated, that the action was brought to recover the sum of 8*l.* 4*s.* 11*d.*: that the plaintiff was in insolvent circumstances, and about the month of June last, assigned all his property, debts, and effects, including the alleged debt for which the action was brought, to two of his creditors, upon trust for the benefit of his creditors: and that the action was prosecuted by the plaintiff solely for the benefit of the two assignees as trustees for the creditors.

1 Man. & G. 445. 1 Rail. R. 296.

Ogle shewed cause upon the affidavit of the plaintiff, which stated, that the deed of assignment did not assign all his property, but expressly exempted from its operation his furniture, of the value of 200*l.* or thereabouts; that he had since set up in business for himself, and had made some money, and that he was now solvent, and well able to pay the defendant's costs, if the verdict should be in his favour. It was submitted, that under these circumstances the Court would not require security for costs. In *Archbold's Practice*, p. 1014, 7th ed., it is said, "The Court or a Judge will not require the plaintiff to give security for costs, merely because he is insolvent, even in a qui tam action, or where he has assigned the debt, unless where he has actually taken the benefit of the Insolvent Act after action brought, and the assignee has not disclaimed the action, or where the action is clearly for the benefit of his assignees." In *Morgan* v. *Evans* (*a*), the Court refused to require the plaintiff to give security for costs, although it was sworn that he was insolvent, and that the action was brought in his name for the benefit of a third party, who was alone

(*a*) 7 Moore, 344.

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beneficially interested in the result. There the Court observed, "that even in the case of an uncertificated bankrupt, security could not be required where the action had been brought for his own benefit." So in *Wray* v. *Brown* (*a*), it was held, that the fact of the plaintiff having been three times insolvent and once a bankrupt, and that he was only suing as a trustee for a third person, afforded no ground for calling on him to give security for costs. [*Alderson*, B.—There the action was not brought for the benefit of the assignees, which distinguishes it from the present case.] In *Day* v. *Smith* (*b*), which was an action on an award by a party who had assigned his interest in it to another, the Court would not, on that ground, compel the plaintiff to give security for costs.

M'Mahon in support of the rule, cited *Hearsey* v. *Pechell* (*c*), and was stopped by the Court.

POLLOCK, C. B.—The rule must be absolute. Where a bankrupt or insolvent sues not for his own benefit, but for that of his assignees, he may be required to give security for costs. In this case the real plaintiffs are the assignees of this portion of the plaintiff's property, in trust for the body of the creditors.

Rule absolute.

(*a*) 6 Bing. N. C. 271; See S. C. 8 Scott, 557; 8 Dowl. 279.
(*b*) 1 Dowl. 460.
(*c*) 7 Dowl. 437; See S. C. 7 Scott, 477; 5 Bing. N. C. 466.

COCK *v.* GENT and Others.

Where a cause was referred by Judge's order, and the arbitrator directed a verdict to be entered for the plaintiff, the order giving him no power so to do, the Court refused to set aside the award on motion.

In such a case, the Court will not enforce the award by attachment, but will leave the party to his remedy by action.

THIS cause was referred by a Judge's order, in the usual terms, to two arbitrators, but the order gave them no power to direct a verdict to be entered for either party. The

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arbitrators awarded, that a verdict should be entered for the plaintiff, with 40*s.* damages, and that the costs of the cause should be paid to him by the defendants.

Wordsworth moved for a rule, to shew cause why the award should not be set aside, on the ground that the arbitrators had exceeded their authority. An arbitrator has no power to direct the entry of a verdict, unless he be expressly authorized by the submission, or a verdict have been taken at Nisi Prius; *Hutchinson* v. *Blackwell* (*a*); *Jackson* v. *Clarke* (*b*); *Donlan* v. *Brett* (*c*). [*Parke*, B.—In the case of *Cartwright* v. *Blackworth* (*d*), *Littledale*, J. considered the direction to enter a verdict for a certain sum as equivalent to an order to pay that sum.] That decision has been overruled by *Donlan* v. *Brett*, in which *Littledale*, J. said, that had he been aware of the case of *Jackson* v. *Clarke*, he should not have decided as he did in *Cartwright* v. *Blackworth*.

PARKE, B.—The cases cited only shew, that the Court will not grant an attachment. We are now asked to set aside the award; and that we ought not to do unless it be perfectly clear that it is void. If the plaintiff enter a verdict, the defendants may move to set it aside; or if the plaintiff seek to enforce the award by action or attachment, the question may then be raised whether he be entitled to do so.

POLLOCK, C. B., and ROLFE, B., concurred.

Rule refused.

A rule was afterwards obtained, calling on the defendants to shew cause why an attachment should not issue against

(*a*) 1 Dowl. P. C. 267; See S. C. 8 Bing. 331; 1 M. & Scott, 513.
(*b*) M'Clel. & Y. 200; S. C. 13 Price, 208.
(*c*) 2 A. & E. 344; See S. C. 4 N. & M. 354.
(*d*) 1 Dowl. 489.

them for non-payment of the sum of 38*l.* 15*s.*, pursuant to the award, rule of Court, and Master's allocatur.

Wordsworth shewed cause. Where there is any question as to the validity of an award, the Court will not entertain it upon motion for an attachment, but will leave the party to his remedy by action. In the present case the award is clearly bad, inasmuch as the arbitrators have exceeded their authority in directing a verdict to be entered. The Court called on

Petersdorff, to support the rule. The award may be supported so far as it directs the defendants to pay the costs, and the present application is to give effect to that part of it, which is totally distinct from the direction to enter the verdict. [*Alderson*, B.—The award must be final as to all matters referred. Here there are two matters, the damages and costs; and if the arbitrator have made a valid adjudication as to one only, the award is not final.] It is conceded, that such is the case where the award is not divisible; but here the adjudication as to the costs may be separated from the other part. [*Alderson*, B.—What is there to determine the matter in dispute between the parties but the entry of the verdict, and that cannot be done?]

POLLOCK, C. B.—The rule must be discharged. In *Jackson* v. *Clarke* (*a*), the arbitrator awarded in these terms, "I award and direct, that a verdict in this cause be finally entered for the said plaintiff, with 284*l.* 12*s.* damages;" and it was expressly decided, that as the award consisted of only one sentence, that direction could not be rejected, and the residue considered as an award that so much was due, and to be paid. And in *Donlan* v. *Brett* it was decided, that an award, that a verdict be entered for the plaintiff

(*a*) M'Clel. & Y. 200; See S. C. 13 Price, 208.

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acknowledgment in writing, and that the plaintiff was not under any of the disabilities which would prevent the statute from operating.

Byles, Serjt., and *D. Power*, in support of the rule. The pleas are bad for want of an averment that the plaintiff took the bill after the dishonour by non-acceptance, and with notice of that fact. The case of *Lewis* v. *Lady Parker* (*a*), shews that the onus of proof would lie on the defendant, consequently he was bound to make the proper averments in his plea. In *Cripps* v. *Davis* (*b*), which was an action by the indorsee against the maker of several promissory notes, the defendant pleaded, that before the indorsement to the plaintiff, and whilst one L. was the holder, it was agreed between him and the defendant that the amount of the notes should be set off against monies due from L. to the defendant; that the notes were thereby satisfied and discharged, and that L. afterwards indorsed them to the plaintiff: and that plea was held bad, for not shewing distinctly that the notes were overdue, when indorsed by L. to the plaintiff. They also cited *Whitehead* v. *Walker* (*c*), and *Blesard* v. *Hirst* (*d*).

POLLOCK, C. B.—The rule must be discharged. The pleas afford a primâ facie answer to the action, and it seems to me that it was not necessary for the defendant to do more. Possibly the plaintiff might have stated in his replication circumstances which would have been an answer to the plea, but in that case I am not prepared to say that the replication would not have been a departure from the declaration. The point which we are now called upon to decide is, whether the defendant is bound to give more than an entire answer to the declaration. I think he is not. Reference has been made to the case of accommodation bills, but they bear no analogy to the present case. A bill

(*a*) 4 A. & E. 838; S. C. 6 N. & M. 294.
(*b*) 12 M. & W. 159.
(*c*) 9 M. & W. 506; S. C. 1 Dowl. 600, N. S.
(*d*) 5 Burr. 2670.

of exchange imports consideration, and if the defendant means to impeach the plaintiff's title by denying it, he must get rid of that which is in effect an allegation contained in the declaration. But here the defendant was not bound to exclude every possible title in the plaintiff; it is enough for him to give a primâ facie answer; and if circumstances exist which would enable the plaintiff to recover, he should allege them, as they lie within his knowledge.

PARKE, B.—I am of the same opinion. Both pleas afford a good defence, and if the plaintiff had any answer he should have replied it. The title which he relies upon is the indorsement to him before the bill became due: the pleas put an end to that title, for they shew that the plaintiff indorsed the bill to some other person who presented it for acceptance, which was refused, and that no notice of that fact was given to the defendant. That is primâ facie an answer to the plaintiff's claim. The inference here is, that the plaintiff took up the bill upon its dishonour, and so was remitted back to his old title. I am not prepared to say whether or not the plaintiff could have replied any other title, without being guilty of a departure; but I am inclined to think that he could not. It is not however necessary for us to determine that point.

ALDERSON, B.—The plaintiff, by his declaration, says, "I am the holder of the bill, and my title consists of the indorsement by the defendant to me." The defendant is bound to answer that title in omnibus, and he does so. If the declaration is to be considered as alleging that the plaintiff was a bonâ fide holder for value, the defendant by his plea admits that fact; but shews that the plaintiff notwithstanding has no right to sue because he indorsed away the bill to an unknown party, by whom it was presented for acceptance and dishonoured, and that the defendant had no notice of that fact. That plea puts an end to the title upon which the plaintiff relies. The plaintiff must then

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shew some other title consistent with the admissions in the plea, and the question then arises, whether he can do so without departing from the declaration, or whether he ought not originally to have stated it in his declaration? Upon that point I give no opinion, but I entertain no doubt whatever that the pleas are good.

ROLFE, B.—The plaintiff in his declaration relies upon the fact that he is the indorsee *of the defendant*, and in order to succeed he must put an end to the answer given by the plea. I very much doubt whether he can do that by shewing that he was the indorsee of some other person.

Rule discharged.

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sc. 14 M. & W. 806

In re STRETTON.

An attorney on being retained to bring an action, gave the following undertaking: "Should the damages or costs not be recoverable in this action, under the circumstances, I shall charge you costs out of purse only." The plaintiff obtained a verdict, with 600*l.* damages, for which sum and costs, judgment was entered up. The defendant took the benefit of the Insolvent Act, and the dividend on his estate awarded to the plaintiff was 272*l.* odd. The Master, on taxation, allowed the attorney costs out of pocket only, but referred the matter to a Judge, who directed the taxation of costs out of pocket only. A second summons was taken out before the same Judge, to review the taxation, and dismissed. *Held*, first, that the party was not precluded from appealing to the Court; and secondly, that the taxation was incorrect.

PEACOCK had obtained a rule nisi to review the Master's taxation of Stretton's bill of costs. The affidavits in support of the application stated, that Stretton had been retained by one Chester to bring an action against Chapman, when the following undertaking was given:—

"Yourself *v.* Chapman.

"Sir,

"Should the damages or costs not be recoverable in this action, under the circumstances, I shall charge you costs out of purse only.

"Yours, &c.,

"C. M. STRETTON."

6. D. & L. 243.

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The action was accordingly commenced, and Chester obtained a verdict, with 600*l.* damages. The costs were taxed at 91*l.* 4*s.* 6*d.*, and judgment was duly entered up and registered for the amount of damages and costs. Chapman afterwards took the benefit of the Insolvent Debtors' Act, and the sum of 272*l.* 3*s.* 4½*d.* was ascertained and appropriated to Chester, as his dividend on the 691*l.* 4*s.* 6*d.*, damages and costs. On the 29th of May last, the Master taxed Stretton's costs out of pocket only, and gave a certificate to that effect, in order to take the opinion of a Judge at Chambers as to the correctness of the principle; but the application was not to prejudice the parties if consented to. Accordingly a summons was taken out, and heard, on the 5th of June, before Parke, B., and an order made to tax the costs out of pocket only; and, on the 12th of June, the Master completed the taxation.

Atkinson shewed cause upon affidavits, which stated, that the Master taxed absolutely, and not de bene esse, and denied that the application was without prejudice; that the summons taken out on the 29th of May was dismissed, with costs, by the Chief Baron on the 31st, (Stretton not attending;) that on the 2nd of June, Stretton took out another summons to review the taxation, which was heard before Parke, B., on the 5th, when the above mentioned order was made; that, on the 10th of June, another summons to review the taxation was taken out by Stretton, and dismissed by Parke, B., on the 13th of June. Upon these facts it was contended, that Chester, having his option to appeal from the Master's decision, either to the full Court or to a Judge at Chambers, had made his election, and, consequently, that there was no further appeal to this Court. *Thompson* v. *Becke* (*a*) is in point. There, a Judge at Chambers dismissed a summons with costs: the unsuccessful party paid the costs, but immediately after-

(*a*) 4 Q. B. 759; See S. C. 1 D. & M. 49.

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wards applied to the Judge, on further summons, to rescind the order. The Judge, learning from the affidavits that the costs had been paid, dismissed the application as made too late. On motion to the Court to rescind the first order, it was held, that the parties having appealed to the Judge who made the order, were bound by his decision, and could not make a further appeal to the Court. [*Pollock*, C. B.—There is an appeal to the Court from every order made by a Judge at Chambers, except where the Judge has a sole authority. In the case cited, there was an appeal to the Judge who made the order *to review his decision*, and in such a case I can well understand, that there is an implied agreement that the Judge's decision shall be final; but in this case, the application to my Brother *Parke* was not by way of appeal from his former decision. *Alderson*, B. —As a general rule, the party may always appeal to the Court; the exception is, where the Judge has a sole jurisdiction, either by act of Parliament, or otherwise. If it were not so, there is hardly any case in which a Judge gives an opinion at Chambers which would not be final. Whenever parties come before me at Chambers, and I see that the question is one to go to the Court, I say that I will not determine it, but that if they choose to treat my opinion as final, I will give it. Where a rule is enlarged to be heard at Chambers, the decision of the Judge is final, for there is an agreement to substitute the Judge for the Court. It is upon that ground that *Thompson* v. *Becke* (*a*) was decided: there Lord *Denman* says, "If the second application had been made to this Court, and counsel had admitted that, before making it, the costs had been paid, the Court would have done what my Brother *Coleridge* did. The defendants here have put him in the place of the Court. Knowing that the Judges sometimes review their own orders, they have taken their chance of such a result in this case; and they must abide by the decision."] With respect to the attorney's right to these costs, it is submitted, that as Chester was

(*a*) 4 Q. B. 759; See S. C. 1 D. & M. 49.

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only entitled to a dividend upon Chapman's estate, the damages and costs were not "recoverable" within the meaning of the undertaking.

Peacock, in support of the rule. The application to *Parke*, B., was not to rescind his order, which would be in the nature of an appeal, but for a new order for the Master to review his taxation.

POLLOCK, C. B.—This rule must be made absolute. There is no reason why the attorney should not be paid out of the damages recovered. It is clear that he only meant to guarantee the goodness of the suit—that, in fact, the suit was available in point of law.

ALDERSON, B.—The attorney never could have meant to guarantee the solvency of the defendant.

ROLFE, B., concurred.

Rule absolute.

SANDERS, Executrix *v.* COWARD. *Sc. 15 M&W. 48.*

To debt on bond, the defendant, after craving oyer of the condition (which was for the performance of the covenants of an indenture) pleaded that no cause of action, by reason of any breach of the condition of the bond, or of the covenants of the indenture, accrued at any time within twenty years next before the commencement of the suit: *Held* bad on special demurrer.

Semble, that the plea should have set out the indenture, and averred performance of all the covenants which were performed within twenty years, and admitted breaches of all those covenants which had been broken before that time; and, as to those breaches, have pleaded the Statute of Limitations.

DEBT on bond. The declaration stated that the defendant, on the 1st day of February, A.D. 1823, by his certain writing obligatory, sealed with his seal &c., became jointly with one John Coward, and separately bound to the plaintiff's testator, in the sum of 1340*l*. Breach, that he had not paid the same, or any part thereof.

Plea. The defendant craved oyer of the condition of the bond, which was as follows:—The condition of this obliga-

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tion is such, that if the above bounden John Coward and James Coward, their heirs, &c., shall well and truly pay or cause to be paid unto the above named E. Sanders and C. R. Sanders, their executors, &c., the sum of 670*l.* of lawful money, &c., with interest for the same at the rate of five per cent. per annum, from the day of the date of the above written obligation, on the first day of February next, according to and in full performance and discharge of the covenant and condition mentioned in an indenture bearing even date with these presents, made or mentioned to be made between John Coward of the first part, the said James Coward of the second part, S. Dangle of the third part, E. S. Sanders and C. R. Sanders of the fourth part, and do and shall also well and truly observe, perform, fulfil, and keep all and singular the covenants, grants, articles, conditions, and agreements whatever, which on their parts and behalf ought to be observed, performed, fulfilled, and kept, comprised and mentioned in the said recited indenture, in all things according to the true intent and meaning thereof, then this obligation to be void, or else to remain in full force. Which being heard and read, the defendant says, that no cause of action in respect of the said writing obligatory, by reason of any breach of the said condition of the said writing obligatory, or of the said covenants, grants, articles, conditions, and agreements, or of any or either of them, in the said indenture in the said condition mentioned, has accrued at any time within twenty years next before the commencement of this suit.

Special demurrer, assigning for causes, that the plea does not confess and avoid or deny the cause of action: that it is consistent with the form of the plea, that the writing obligatory had never become forfeited.

The points marked for argument on behalf of the defendant were, that it is not the duty of the defendant to set forth in his plea the breach or breaches of the condition of the bond for which the plaintiff prosecutes his action, as that is a matter entirely within the plaintiff's knowledge:

that it is impossible for the defendant to know on what breach in particular, or on how many breaches the plaintiff intends to rely: that it would be inconsistent with the general rules of law and pleading to compel the defendant to state his adversaries' case, or to confess and admit particular facts against himself: and that the plea does confess a general forfeiture of the bond, and amounts to an admission of any breach of the condition which the plaintiff may choose to rely on.

Montague Smith, in support of the demurrer. The plea is founded on the 3 & 4 Wm. 4, c. 42, s. 3, which limits actions upon bond or other specialty to twenty years (*a*). The same question was before the Court on a previous occasion, when an amendment was suggested (*b*). The first objection is, that the plea does not confess and avoid

(*a*) "That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation herein-after expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

(*b*) *Ante*, vol. 1, p. 1012; S. C. 13 M. & W. 65.

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the cause of action; for it is consistent with every allegation in the plea, that no breach has ever occurred. The defendant ought to have set out the indenture, and after confessing the breach, should have alleged that the cause of action in respect thereof, did not accrue within twenty years. To a plea of performance the plaintiff must reply a breach. Before the statute 8 & 9 Wm. 3, c. 11, he was limited to a single breach. That act did not alter the rules of pleading, but only allowed the plaintiff to reply several breaches. If the plea set up matter of excuse, it is sufficient to deny the excuse alleged. Suppose in this case the plaintiff replied setting out a single breach; is the plea to be construed as a confession by the defendant that he has broken every condition and covenant contained in the indenture? If not, the plea must be taken as a denial that there ever was any breach at all. By the fifth section of the 3 & 4 Wm. 4, c. 42, an acknowledgment either by part payment or by writing, is sufficient to take the case out of the statute; but the acknowledgment must be specially replied; could then the plaintiff make a good replication to this plea by saying, that the breach is the non payment of money more than twenty years ago, and that there is an acknowledgment in writing within twenty years. The defendant might rejoin, "I have paid the money, and whatever breach you choose to assign, took place more than twenty years ago." [*Parke*, B.—This is the result of the double operation of the statutes of Wm. 3 and Wm. 4. The defendant cannot tell whether you are suing in respect of a breach of the bond or the covenant, or for how many breaches. He cannot plead performance, because he could not rejoin that the breach accrued more than twenty years ago; for that would be a departure from the plea.] Suppose one cause of action to have accrued upon the first breach of the condition, there would be no difficulty in saying, "I broke the condition by non payment of the money, but that happened more than twenty years ago." [*Alderson*, B.—As no cause of action is assigned in the declaration, the

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defendant cannot tell what the cause of action is, to which he is to plead as not having accrued within twenty years. You say he must know what he has done, but unless you assign a breach, he cannot tell what you mean to say he has done.] The right of action on the bond would be barred, after twenty years from the first breach. [*Platt*, B. —Suppose the defendant admit one particular breach, and plead, that such breach took place more than twenty years ago; the plaintiff might then go on and assign another breach.] If the covenants in the deed were impossible to be performed, the bond would be single, and a cause of action would accrue to the plaintiff, upon the obligatory part of the bond; *Com. Dig.*, tit. "*Condition*," (D. 1). Such a state of things may exist in the present case. The plea does not shew to the Court what the covenants, articles, and agreements are; but only says that no cause of action exists by reason of them. [*Alderson*, B.—It does not appear by the record, whether the conditions are possible or impossible; why, then, are we to assume that they are impossible?] The defendant ought to set out the conditions, for it is incumbent on him to get rid of the obligatory part of the bond by shewing a performance. In *Ashbee* v. *Pidduck* (*a*), it was held not to be necessary, in debt on bond, to aver a breach in non payment of the money; but that it was sufficient for the plaintiff to shew the debt due, and that then it lay on the defendant to discharge himself. If the deed contain any disjunctive covenant or covenants in the negative, the defendant must set out the whole deed, and allege performance of the one, and deny non performance of the other; *Webb* v. *James* (*b*).

W. H. Watson, contrà. Since the statute of Wm. 3, the form of pleading in debt on bond is quite anomalous. This plea, which was framed after the decision of the Court on

(*a*) 1 M. & W. 564.
(*b*) 9 Dowl. 314; S. C. 7 M. & W. 279.

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the former demurrer, is sufficient. Under the Statute of Limitations, the cause of action does not arise from the making of the bond, but from the committing of the first breach. As to the objection that this plea is not in confession and avoidance, it is doubtful whether a plea of the Statute of Limitations ever confesses and avoids the cause of action; whether in truth it is not a statutory defence. Non assumpsit infra sex annos, has never been held a bad plea. [*Alderson*, B.—It cannot be a plea in confession and avoidance, because it would be proved by shewing that there was no contract whatever. If no evidence were offered under the issue of actio accrevit infra sex annos, the defendant would be entitled to the verdict, because the issue is on the plaintiff; consequently that plea cannot be in confession and avoidance. The Statute of Limitations means this, "I put you to prove a contract or a breach within twenty years."] The difficulty arises from the anomalous form of pleading in debt on bond. In the case of a simple contract debt, the plaintiff must shew a contract and a breach; but in an action on a bond, it is sufficient to allege that the defendant bound himself by a writing obligatory, and that he did not pay the money on the day. It is said, that the defendant should have confessed a breach, and then have alleged that such breach did not accrue within twenty years; but such a plea would be clearly insufficient, unless it averred that there never was any other breach. Numerous breaches might have taken place, and it is impossible for the defendant to know upon which the plaintiff relies. He might be proceeding for a breach which occurred more than twenty years ago, and when the statute was pleaded, might reply by suggesting breaches within twenty years. In the case of an action for goods sold and delivered, which comprise three distinct items, the plaintiff might have separate answers to the plea of the Statute of Limitations; for instance, as to one of the causes of action, he might reply an acknowledgment in writing; as to another, that he was non compos mentis; and as to the

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third, that the defendant was beyond the seas. If, in the same way, each particular breach of a bond constitute a cause of action within the meaning of the statute, there would be no difficulty in distributing the answers to each separate breach. In delivering judgment on the former demurrer, *Pollock*, C. B., says (*a*), "The action, no doubt, is brought for the recovery of the penalty of the bond; and in one sense it may be said that the penalty is the 'cause of action;' that it is which the plaintiff recovers; and having obtained a verdict on one breach, the judgment would be for the penalty, and execution would be taken out for the damages on that breach, the judgment standing as a security: but the cause of action also, in another sense, is the breach or breaches of the condition of the bond." The term "cause of action" in the Statute of Limitations, does not mean the first forfeiture of the bond; but the cause of action arising from each successive breach. If it be incumbent on the defendant to shew a breach, he would be bound to set out every possible breach. When a matter is purely within the knowledge of one party, the rules of pleading require him to allege it. [*Alderson*, B.—The defendant knows what he has himself done or omitted to do, but he does not know what the plaintiff means to bring his action for. Suppose the defendant covenants for the act of a third party, how is he to know what breach has been committed?] The defendant could not set out the indenture, because it is in the plaintiff's hands. [*Parke*, B.—If he pleaded performance, he must have set it out, and the reason is, that otherwise it does not appear whether there are disjunctive or negative covenants; *Earl of Kerry* v. *Baxter* (*b*). *Alderson*, B.—No doubt a Judge at Chambers would order it to be produced, if there were only one part to it.] The same rule will not apply to a plea which alleges that there was no cause of action by reason of a breach. If this bond

(*a*) 13 M. & W. 71; S C. *ante*, vol. 1, p. 1012.
(*b*) 4 East, 340; S. C. 1 Smith, 106.

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were not subject to a condition, the plea would be a good bar. [*Parke*, B.—No: you have not pleaded that the cause of action accrued by reason of the bond.] The plea in effect states that, when it alleges that there was no breach within twenty years. [*Parke*, B.—If you had set out the indenture, and it appeared that the condition was impossible, and therefore void, the plea would nevertheless be bad.]

M. Smith, was heard in reply.

Cur. adv. vult.

The judgment of the Court was afterwards (*a*) delivered by

PARKE, B.—(After stating the pleadings.) There had been a plea to the same declaration, and a special demurrer to it, which came on before the Court in Trinity Term, 1844, and the Court held the plea bad for uncertainty, but gave the defendant leave to amend (*b*). The amended plea being now demurred to specially, two objections were taken to it, one that the plea ought to have set out the indenture at length; the other, that the plea that no action accrued by reason of a breach of the condition within twenty years, was bad in form, as not being either in confession and avoidance, or denial of the cause of action. The first of these objections, which was not the principal one insisted on, ought, we think, to prevail. It is perfectly settled (*c*), that the indenture ought to be set out when performance is pleaded; because it might contain negative and affirmative covenants, or, as Lord Coke says (*d*), "a covenant for something "to be done of record;" in all which cases performance must be pleaded specially. Where, however, performance is not pleaded, but non performance excused, the same reason does not apply; but it is insisted that the

(*a*) In Hilary Term.

(*b*) *Ante*, vol. 1, p. 1012; S. C. 13 M. & W. 71.

(*c*) *Earl of Kerry* v. *Baxter*, 4 East, 340; *Ellis* v. *Box*, Aleyn. 72; *Tapscot* v. *Wooldridge*, 1 Sid. 425.

(*d*) Co. Litt. 303 b.

indenture ought to be set out, in order that the Court may see that it contains covenants, all of which were, at the time of the making of the bond, capable of being performed; for if any one were impossible, the bond would be single, and if so, the plea, which relates to the breaches only, bad. We think that this is a good reason for requiring the indenture to be set out, and it should be so done if the defendant amends, as we propose to give him liberty to do. The next and principal objection is to the form of the plea, which states, "that no cause of action by reason of any breach of the conditions of the said writing obligatory, and of the covenants in the said indenture, accrued at any time within twenty years next before the commencement of the suit;" we think this plea bad in form. In construing the third section of the 3 & 4 Wm. 4, c. 42, it seems to us that the limitation in an action on bond, of "twenty years after the cause of action or suit," is not to be confined to twenty years from the first breach of the condition to do various things, any more than it would be confined to that period from the first breach of covenant to do various things, in an action of covenant. Although on the first breach of the condition of a bond, the obligee may sue the obligor, and have judgment for the penalty under the statute of 8 & 9 Wm. 3, c. 11, as a security of a higher nature for future breaches; he is not bound to pursue that course. He may waive the right of action on the bond in respect of the first breach, or any number of breaches, and be contented with the specialty security only, for future breaches, and sue afterwards on a subsquent forfeiture, and assign that for a breach. If it were not so, the inconvenience would be considerable, and the value of the security of a bond diminished; and it is to be observed, that the limitation in the statute is not from the cause of action first accrued on the bond, but generally from the cause of action. This construction leaves the obligee much in the same situation as before the act, except that the statute gives to the lapse of time the effect of an absolute bar to the remedy, instead

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of its being used as evidence of payment or performance of the condition, as it would have been before. If before the statute there had been a bond for the payment of twenty annual instalments, the lapse of twenty years from the time fixed for the payment of each instalment, would have been good evidence to raise a presumption of the due payment of each instalment; but the right to recover the instalment due within twenty years, would be unaffected. The supposition on which the plea is framed, namely, that to constitute a bar under the statute every breach of the condition ought to be shewn to have been beyond twenty years, is correct; but we think that the plea is bad in form. It is not clear whether its meaning be, that every condition or covenant was to be performed, and was broken more than twenty years ago; or that for the last twenty years every condition and covenant had been duly performed. If the latter be the meaning, it is an incorrect form of pleading; for the breach binds in the first instance, and the defendant must exonerate himself by pleading performance, if he mean to insist that the breach has not been fulfilled; he cannot be allowed to say that there has been no breach of the bond generally, and throw it on the plaintiff to prove a breach, but he must shew by proper affirmative pleading, that the condition has been duly performed. This circumstance makes a difference in the form of a plea of the Statute of Limitations, to an action in the old form, or a bond with a condition; and to an action of covenant, setting forth, as it must do, the breaches which the plaintiff insists upon, (as to which there would be no difficulty in pleading in the ordinary form, that the causes of action in the declaration mentioned, did not accrue within twenty years, nor would there possibly be any in adopting a similar plea in the case of an action on a bond, stating the breaches in the declaration). We think that the plea cannot be supported, and our judgment must be for the plaintiff; but the defendant may have liberty to amend on the usual terms. What the form of amendment should be, must

depend upon the nature of the covenants and the facts; but the defendant's counsel will consider whether the plea which should set out the indenture, should not aver performance of all the covenants that were performed within twenty years, and admit the breaches beyond that time, and as to those breaches plead the Statute of Limitations.

Amendment accordingly (*a*).

(*a*) This case was decided in Hil. Term, 1846.

In re WHALLEY.

Semble, that the Court will dispense with personal service of a rule for an attachment, in cases where there is no other remedy, and it is clear that the party keeps out of the way to avoid service.

HUDDLESTON moved to make absolute a rule for an attachment against an attorney for not delivering his bill of costs. The rule to shew cause had not been personally served; but it appeared from the affidavits, that the attorney knew of the rule, and was keeping out of the way to avoid service. Notwithstanding the cases of *Wilkinson* v. *Pennington* (*a*), and *In re Pyne* (*b*), it would seem, that in this Court, at least, personal service is not always indispensable. In the case of *In re Barwick* (*c*), a rule for an attachment against an executor for not accounting pursuant to a rule of Court, was made absolute, though that rule had not been personally served; it appearing that the party kept out of the way to avoid service. In the case of *In re Fennell* (*d*), a similar rule was granted. The true principle is stated in *Richmond* v. *Parkinson* (*e*), namely, that the Court will not dispense with personal service, where there is any other remedy.

PARKE, B.—It certainly is not laid down that under no circumstances will the Court dispense with personal service. Suppose a case where there is no other remedy for the recovery of a debt but by attachment, and it is

(*a*) 6 Dowl. 183. S. C. 5 Scott, 401.
(*b*) *Ante*, vol. 1, p. 703.
(*c*) 3 Dowl. 703.
(*d*) 3 Dowl. 703, note (*a*).
(*e*) Ibid. 703.

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certain that the party is avoiding service; it is not clear that the Court would in such a case insist on personal service.

[The Court then desired to hear the affidavits, which stated a call at the attorney's residence, and the deponent's belief that the attorney was in the house at the time, but it did not appear that he had been seen there. It then stated a subsequent call at his office, and that a copy of the rule was left there with his brother, who returned it on the following day.

[The Court thought that further attempts should be made to effect personal service; and it appearing that the rule had expired, they granted a fresh rule for that purpose.]

Rule accordingly (*a*).

(*a*) The parties succeeded in serving this rule *personally*: so that the point was not again raised.

S.C. 14 M. & W. 845.

DIETRICHSEN *v.* GIUBILEI.

The first count of a declaration stated, that whereas the defendant had become and was tenant to the plaintiff of certain rooms, on the terms that the defendant should not allow any nails to be driven into the walls; that whereas the defendant had become and was tenant to the plaintiff of certain rooms, on the terms that the defendant should not allow any nails to be driven into the wall, and that if any damage should arise from his so doing, he should pay the costs of repairing the same on his vacating the premises; and that in consideration thereof, the defendant promised the plaintiff not to allow any nails to be driven as aforesaid, and that if any damage should arise therefrom, he would pay the costs of repairs: Breach, that defendant pulled down bells, and drove nails into the walls, and that the costs of repairing the injuries amounted to 150*l.*; yet the defendant had not paid that sum *to the plaintiff*. Plea, that after the making of the promise so far as relates to the driving of the nails, the defendant did pay the costs of repairing the injuries occasioned thereby: *Held*, on special demurrer, that the plea was bad, for professing to answer the whole count, and answering but a part; and that the breach in the first count properly alleged non-payment of the costs *to the plaintiff*; and that the count was not bad for omitting to state that the defendant became tenant at the request of the plaintiff.

ASSUMPSIT. The first count of the declaration stated, that whereas the defendant had become and was tenant to the plaintiff of certain rooms, on the terms that the defendant should not allow any nails to be driven into the walls;

The second count of the declaration alleged, that in consideration that the plaintiff would permit a brass plate to be fixed on the outer door of the premises, the defendant promised to cause a new door to be put up at the expiration of the tenancy: breach, that he did not do so. Plea to the second count, that before any cause of action accrued, the defendant offered to cause a new door to be affixed; but that the plaintiff refused to allow him so to do, and discharged him from carrying the said agreement into execution: *Held*, on special demurrer, that the plea was bad for duplicity.

and that if any damage should arise from so doing, the defendant should pay the costs of repairing the same on vacating the apartments; and that in consideration thereof, the defendant then promised the plaintiff to use the rooms in a tenant-like manner, and not to allow any nails to be driven as aforesaid, or that, if any damage should arise therefrom, the defendant would pay the costs of repairing all injuries occasioned thereby. The declaration then averred, that the defendant quitted possession of the said rooms; and alleged, as a breach, that he did not use the said rooms in a tenant-like manner; but, on the contrary thereof, pulled down divers bells, and broke and destroyed divers chimney-pieces and stoves, and drove nails into the walls: and although the costs of repairing the injuries of the walls amounted to a large sum of money, to wit, 150*l.*; yet the defendant had not paid the said sum of 150*l.*, or any part thereof, *to the plaintiff.*

The second count stated, that in consideration of the plaintiff permitting a certain brass plate to be fixed to the outer door of the house, and to remain there during the tenancy, the defendant promised the plaintiff to cause a new outer door to be made and fixed up in the entrance of the dwelling-house at the expiration of the tenancy; that although the brass plate was fixed, and remained upon the door during the tenancy; yet the defendant did not nor would, at any time, cause a new door to be made and fixed up in the said dwelling-house.

Plea to the first count. And for a further plea in this behalf to the said first count, that after the making of the promise in the said first count mentioned, so far as relates to the driving of the said nails in that count mentioned, he, the defendant, paid the costs of repairing the injuries occasioned by the driving of the nails, &c. Conclusion to the country.

Plea to the second count. That before the commencement of the suit, to wit, on, &c., the defendant was ready and willing, and then tendered and offered to the plaintiff, to

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cause a new door to be made and fixed up in the entrance of the said messuage or dwelling-house, to accept which said offer the plaintiff then wholly refused, and did then wholly forbid and prevent the defendant from causing the said door to be so made and fixed up as aforesaid; and hath since, and still doth, wholly refuse to allow the defendant to enter into and upon the said messuage or dwelling-house for the purpose of causing the said door to be so made and fixed up as aforesaid. And the plaintiff, to wit, on, &c., wholly declined, and disavowed, and discharged the defendant from the carrying of the said agreement and promise in the said second count mentioned into execution; for which reason, and no other, the defendant did not, upon or before the expiration of the said tenancy, nor hath he, at any time since hitherto, caused such new door to be made and fixed up in the said entrance of the said messuage or dwelling-house, according to the tenor and effect, true intent and meaning of his said promise in that behalf. Verification.

Special demurrer to the plea to the first count, assigning for cause, that it professes to answer the whole of the first count, but, in fact, answers a part only, namely, that which relates to the driving the nails into the walls.

Special demurrer to the plea to the second count, assigning for cause, that the plea is multifarious and double in this, that it first alleges that the plaintiff prevented the defendant from performing the agreement; and secondly, that plaintiff discharged the defendant from the performance of it.

Bovill, in support of the demurrers. The plea to the first count is bad for the cause assigned: *Putney* v. *Swan* (*a*); *Hughes* v. *Pool* (*b*); and *Parratt* v. *Goddard* (*c*), are authorities in point. The plea to the second count is clearly bad for duplicity, as it sets up two distinct answers to the

(*a*) 5 Dowl. 296; S. C. 2 M. & W. 72.

(*b*) 6 M. & G. 271; S. C. 6 Scott, N. R. 959.

(*c*) 1 Dowl. 874, N. S.; S. C. 9 M. & W. 458.

count. The case of *King* v. *Gillett* (*a*) shews, that the allegation in the plea, "that the plaintiff discharged the defendant from his promise," would of itself have been sufficient.

Ball, contrà. The plea to the first count substantially answers the whole of that count. The plaintiff could not recover any damage in respect of the pulling down the bells, and destroying the chimney-pieces, stoves, &c.; for it is not alleged that those articles belonged to him; *Pritchard* v. *Long* (*b*). The destruction of the property is mere matter of aggravation. The first count is bad, inasmuch as there is a variance between the promise and the breach. The promise is to pay the costs of repairing, but the breach alleged is, that the defendant did not pay those costs *to the plaintiff*. The breach should be assigned in the words of the contract, or in words which are co-extensive with its import and effect; 1 *Chit. Plead.* 341, 7th ed. It is consistent with the promise alleged, that the defendant was bound to pay the costs of repairing to the persons employed to do the work. The count is also bad for not averring that the defendant became tenant "at the request" of the plaintiff. The count alleges, that the defendant had become and was tenant to the plaintiff; and it might be, that the plaintiff was only assignee of the reversion, and that no new contract existed between him and the defendant. A similar objection was taken in the case of *Chownes* v. *Brown* (*c*). The plea to the second count is in accordance with the precedent in 3 *Chit. Plead.* 198, 7th ed.

Bovill, in reply. It was not necessary to allege, that the defendant became tenant "at the request" of the plaintiff. [*Parke*, B.—Would the count be supported by proof that the premises had been demised by another person to the

(*a*) 7 M. & W. 55.
(*b*) 1 Dowl. 883, N. S.; S. C. 9 M. & W. 666.
(*c*) *Ante*, vol. 2, p. 706.

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defendant on the terms alleged, and that the plaintiff afterwards had the lease assigned to him? It is difficult to see how the assignee of the reversion of a parol lease can take advantage of the covenants in that lease, and bring assumpsit against the tenant.] If the defendant became tenant to the plaintiff, there must have been a contract between them. When it is stated that the defendant became tenant, it shows the assent of both parties to the tenancy. [*Parke*, B., referred to *Brown* v. *Crump* (*a*).] There the declaration sought to charge the defendant with obligations which did not arise out of the bare relation of landlord and tenant. He referred to *Richardson* v. *Gifford* (*b*), and *Granger* v. *Collins* (*c*).

PARKE, B.—I think the declaration is good on general demurrer. Under a traverse of the tenancy, it would be incumbent on the plaintiff, (if not the original landlord,) to prove that the defendant became his tenant upon the terms entered into between the defendant and the original landlord. The case is distinguishable from those in which nothing is stated as a consideration for the promise but the mere relation of landlord and tenant. Under that relation, no more is implied than that the defendant will not commit waste. Thus in *Brown* v. *Crump* the declaration stated, that in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon; and the Court of Common Pleas held that declaration bad on general demurrer. Here it is stated that the defendant was bound, as between him and the plaintiff, not to drive any nails into the walls, and to use the premises in a tenant-like manner; and that imports the allegation, (if it were necessary there should be an original contract between the parties,)

(*a*) 1 Marsh. 567.
(*b*) 1 A. & E. 52; S. C. 3 N. & M. 325.
(*c*) 6 M. & W. 458.

that there was such a contract. With respect to the pleas, that to the first count is clearly bad; for it is pleaded to the whole count, and answers but a part of it. The other plea attempts to set up a double answer; and, besides, there is no offer to perform the contract at the time the defendant was bound to perform it, namely, at the end of the term; for it is consistent with every allegation in the plea, that the offer was made at the beginning of the term. Then, the first breach alleged in the first count is sufficient, for it must be inferred, that the articles said to have been removed were fixtures; the second breach is also well assigned, because the contract between the parties is not, that the defendant should repair the damage done by driving the nails into the walls, but that he should pay the costs of repairs; which must mean that he is to pay the costs to the landlord, who is to employ workmen to do the repairs. The defendant may amend on payment of costs; otherwise there must be judgment for the plaintiff.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Amendment accordingly.

YORSTON *v.* FETHER.

SC. 14 *Sm. & W.* 551

To an action for goods sold, the defendant pleaded, that before the commencement of the suit, the plaintiff petitioned the Court for the relief of Insolvent Debtors, and that an order was made vesting his estate and effects in the provisional assignee of that Court. The plaintiff replied that the petition was dismissed, and the plaintiff discharged from custody, without taking the benefit of the act: *Held*, on special demurrer, that the replication was bad, for not alleging that the petition was dismissed before the commencement of the suit.

DEBT for goods sold, &c.

Plea: that after the making of the contracts, and after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, to wit, on the 16th of February, 1844, the plaintiff had petitioned the Court for the relief of Insolvent Debtors, (under 1 & 2 Vict. c. 110,) and that the usual vesting order had

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been made by that Court on the day and year aforesaid, to vest in the provisional assignee of insolvent debtors in England, all the real and personal estate and effects of the plaintiff, &c., and all the future right, title, interest, and trust of the plaintiff, to any real or personal estate, &c., which the plaintiff might purchase, or which might revert, descend, be devised or bequeathed to him, before he should become entitled to his final discharge in pursuance of the said act, and according to the adjudication in that behalf; or, in case the plaintiff should obtain his final discharge from custody without any adjudication being made by the said Court, then before the plaintiff should be so fully discharged from custody; and all debts due and growing due to the plaintiff, or to be due to him before such discharge as aforesaid: by virtue of which said order, and of the said statute, the debts and sum of money in the declaration mentioned then and before the commencement of this suit, became and were vested in the said provisional assignee, which said vesting order still remains in full force and effect, &c.

Replication: that after the making of the vesting order in the plea mentioned, to wit, on, &c., it was duly ordered by the said Court for the Relief of Insolvent Debtors, that the said petition of the plaintiff in the plea mentioned should be dismissed, the plaintiff having been discharged from custody without taking the benefit of the said act; and the said petition was thereby then dismissed by the said Court: that the said provisional assignee had not received, nor the defendant paid to him, the debt and monies in the declaration mentioned and demanded, or any of them, or any part thereof, &c.

Special demurrer, assigning for cause that it did not appear by the said replication at what time the said petition was dismissed.

Willes, in support of the demurrer. It is consistent with

every allegation in the replication that the petition was not dismissed until after the commencement of the present action. A plea of the plaintiff's discharge under the Insolvent Act must aver that the vesting order was made before the commencement of the suit; *Tucker* v. *Webster* (*a*). An action does not lie before the cause of action accrued; *Com. Dig.* "*Action*" (E); and upon these pleadings it appears that the plaintiff had no cause of action at the time he sued out his writ. He also cited *Allen* v. *Hopkins* (*b*).

F. V. Lee, contrà. The question turns upon the construction of the 37th section of the 1 & 2 Vict. c. 110 (*c*).

(*a*) 1 Dowl. 960, N. S.; S. C. 10 M. & W. 371.

(*b*) 13 M. & W. 94.

(*c*) Enacts, "that upon the filing of such petition by such prisoner, or on the filing of such petition by such creditor or creditors as aforesaid, and the evidence in support thereof, as the case may be, it shall be lawful for the said Court for the Relief of Insolvent Debtors, and such Court is hereby authorised and required, to order that all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessaries of such person and his family, and the working tools and implements of such prisoner, not exceeding in the whole the value of twenty pounds, and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his final discharge in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his full discharge from custody without any adjudication being made by the said Court, then before such prisoner shall be so fully discharged from custody; and all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid, shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, and such order shall be entered of record in the same Court, and such notice thereof shall be published as the said Court shall direct; and such order when so made shall, without any conveyance or

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That section contains a proviso, that in case the petition of any prisoner shall be dismissed, the vesting order shall be null and void to all intents and purposes. After the dismissal of the petition, the plaintiff was restored to his original rights, and stood in the same situation as if the petition had never been preferred. The intermediate acts of the provisional assignee are protected by the subsequent part of the section, but the insolvent's rights are revived as to all other persons.

Willes was not called on to reply.

PARKE, B.—It appears to me that this is a very clear case. The plaintiff, it is plain, could have no right to maintain this action, independently of the proviso in the 37th section of the 1 & 2 Vict. c. 110. Does then that

assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee: provided always, that in case the petition of any such prisoner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismission be null and void to all intents and purposes: provided also, that in case any such vesting order as aforesaid shall become null and void by the dismission of the prisoner's petition, all the acts theretofore done by the said provisional assignee, or any person or persons acting under his authority, according to the provisions of this act, shall be good and valid; and no action or suit shall be commenced against such provisional assignee, nor against any person duly acting under his authority, except to recover any property, estate, money, or effects of such prisoner, detained after an order made by the said Court for the delivery thereof, and demand made thereupon: provided also, that when such vesting order shall have been made on the petition of a creditor as aforesaid, it shall be lawful for the said Court, if it shall seem just and right, but not without proof made to the satisfaction of the said Court of the consent of the petitioning creditor, to make order declaring such vesting order to be null and void, and the same shall thereupon be null and void to all intents and purposes."

proviso give him that right? Upon these pleadings it must be taken that the plaintiff had no cause of action at the time he sued out his writ, and that in the interval between that time and the dismissal of the petition, the defendant had a good answer to the plaintiff's claim. How then can the statute give him any right to sue if he had none when he issued the writ? If it had that effect, it would do that which is unknown to the law in any other case. But it is not so, for the proviso in the 37th section, "that in case the petition of any prisoner shall be dismissed, the vesting order made in pursuance of it shall, from and after such dismission, be null and void to all intents and purposes," must be understood as meaning that it shall be null and void from the time it shall be so declared by the Insolvent Court. Our judgment must, therefore, be for the defendant.

ALDERSON, B.—The defendant had a good defence at the time the action was brought, and also at the time of plea pleaded. How then can that defence be taken away by an act subsequently done by others?

ROLFE, B., and PLATT, B., concurred.

Judgment for Defendant.

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5 C. 14 M. & W. 730

A rule to discharge a rule for a new trial, on the ground that the party has neglected to pay costs, is in this Court a rule nisi, which makes itself absolute, unless cause be shewn within a limited time.

IN this case a rule had been made absolute for a new trial, on payment of costs. The costs were taxed, and the amount demanded, but not having been paid;

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Hugh Hill moved to discharge the rule for a new trial. The question was, whether the rule ought to be absolute in the first instance. There was no decision in this Court; but in the case of *Champion* v. *Griffiths* (*a*), in the Court of Queen's Bench, *Patteson*, J., granted a rule absolute in the first instance; observing, "that if there were any reason for reviving or re-opening that rule, the party might apply to the Court for that purpose."

PER CURIAM.—The better course will be to grant a rule nisi, which will make itself absolute, unless cause be shewn to the contrary within a limited time.

Rule accordingly.

(*a*) 1 Dowl. 319, N. S.

S C. 14 M. & W. 855.

SUTCLIFFE *v.* BROOKE.

A declaration in debt by the assignee of an insolvent debtor, stated that the plaintiff had brought an action against the defendant to recover a debt due to the insolvent; that after issue joined, the cause was referred to arbitration by order of nisi prius. The declaration then alleged mutual promises to abide by, perform, and fulfil the award; and that the arbitrator awarded that the plaintiff was entitled to recover a certain sum: breach, non payment.

Held, on special demurrer, that the allegation of mutual promises rendered the declaration bad.

Held also, that it need not appear by the declaration that the submission to arbitration was with the consent of the major part of the creditors of the insolvent; and *semble*, that the absence of such consent would not vitiate the award.

DEBT by the plaintiff as assignee of one Jonas Ingram, an insolvent debtor. The declaration stated, that an action on promises by the now plaintiff as such assignee had been brought, to recover the sum of 1000*l.* due to the insolvent, for goods sold and delivered by him to the defendant, and for money due on an account stated. That the defendant pleaded non assumpsit; that the plaintiff was not assignee; payment to the insolvent before action brought; payment to the assignee before action brought, and a set-off for work and labour; that the plaintiff traversed the pleas of payment and set-off, and that issue was joined on all the pleas.

The declaration then alleged, that the cause being about to be tried at the assizes, to wit, on, &c.; by a certain order in writing of the Judge of assize, &c., it was (amongst other things) ordered, by the consent of the parties to the action, that the record should be withdrawn, and that all matters in difference in the action and between the parties, should be referred to arbitration, so that the arbitrator should make his award in writing of and concerning the matters referred, ready to be delivered to the parties, &c., on or before the 1st day of November then next ensuing, or at such time or times as he should on the said order indorse; and also that the parties should in all things abide, &c.; the costs of the said action, to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator; and also that the order of reference should be made a rule of Court. The declaration then alleged, that in the said order of reference, the Christian name of the insolvent Ingram was by mistake written Joseph, instead of Jonas; that the arbitrator took upon himself the burden of the reference; and, on the 28th day of October, 1844, by indorsement on the order of reference, duly enlarged the time for making his award until the first day of Michaelmas Term, 1845; before which day, to wit, on the 1st of November, 1844, the Judge made a further order in writing that the said order of reference be amended, by altering the name of Joseph to that of Jonas, and that the arbitrator should proceed to make his award; which amendment was made accordingly. The declaration then proceeded thus: "Of all which premises the plaintiff and the defendant then had due notice; and thereupon, in consideration of the plaintiff's then agreeing, at the request of the defendant, to abide by, perform, and fulfil the award, so to be made as aforesaid, on his the plaintiff's behalf, the defendant then agreed with the plaintiff to abide by, perform, and fulfil the same on his the defendant's behalf. And the plaintiff further says, that afterwards and before the said enlarged time for making the said award had

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elapsed, to wit, on the 22nd of January, 1845, the said arbitrator having duly heard, &c., did make and publish his award in writing, &c., and did thereby find and award all the issues joined generally for the plaintiff, except so much of the said issue joined on the first plea as related to the last count in the declaration, and so much of the issue first joined upon the said first plea as related to the last count of the declaration, which the arbitrator thereby found for the defendant: that the plaintiff, as such assignee, was entitled to recover from the defendant on the first count the sum of 372*l.* 3*s.*, and the said arbitrator assessed the damages of the plaintiff on the first count at 372*l.* 3*s.*, which sum the arbitrator then ordered and awarded, and directed to be paid by the defendant to the plaintiff, or his attorney or agent. And the said arbitrator thereby further declared, that the defendant never made any payment to the plaintiff for or in respect of the causes of action in the first count mentioned, or any part thereof. And the arbitrator thereby awarded and declared, that in finding the said sum of 372*l.* 3*s.* to be due to the plaintiff, and assessing the said damages as aforesaid, he had allowed to the defendant, and given credit to him, for all and singular the sum and sums which were ever paid by the defendant to the said Jonas Ingram before he became such insolvent debtor as in the declaration mentioned, for or in respect of the causes of action in the said first count mentioned, or any part thereof. And the said arbitrator further awarded, that no further proceedings be had save the taxation of costs of the award: and touching and concerning the matters in dispute between the parties out of the said cause, that neither of the parties at the time of making the order have any other claim or demand against the other. And the said arbitrator also awarded the defendant to pay the costs of the reference and award; of which said award the defendant afterwards and before the commencement of this suit, had notice. The declaration then averred, that after the making of the award, and before the commencement of the present suit,

the award, &c., was made a rule of this Court; that on the 18th of February, 1845, the costs of the plaintiff were taxed at 280*l.* 15*s.*, of which the defendant had notice, and was afterwards requested to pay the respective sums of 372*l.* 3*s.*, and 280*l.* 15*s.*; and that although a reasonable time for the payment thereof had elapsed before the commencement of this suit, the defendant did not, nor would pay the same, &c.

Special demurrer, assigning numerous causes, but those relied upon sufficiently appear from the argument.

Atherton, in support of the demurrer. First, there is no precedent for this form of action. It is not an action of debt on an award, but an action founded on mutual promises to abide by an award not then made. In *Watson on Arbitration* (*a*), it is said, "the several actions for the non-performance of an award are, debt on the award; debt on bond conditioned for the performance of an award; and covenant or assumpsit on the deed or agreement of submission." That doctrine is supported by the current of precedents. In *Hansard's Entries*, p. 89, there is a declaration in debt on an award, and it states the submission of matters in difference, and the award for the payment of money, and concludes with per quod actio accrevit. In *Rastall's Entries*, pp. 155, 6, there are other examples of debt on arbitrament. So also in the *Liber Placitandi*, p. 107; *Wentworth Plead.* vol. 5, p. 341; *Chit. Plead.* vol. 2, pp. 295, 298, 7th ed.; 2 *Wms. Saund.* 61 m. In *Brownlow's Entries*, pp. 41, 80, there are precedents of declarations in assumpsit upon a submission to arbitration. So also in *Hansard's Entries*, p. 13; *Coke's Entries*, p. 3; *Liber Placitandi*, p. 19; *Wentworth Plead.* vol. 1, pp. 90, 9; *Chit. Plead.* vol. 2, p. 176, 7th ed. All these precedents are in effect the same, but none of them warrant the present form of declaration. Secondly, this declaration is contrary to principle. In *Rudder* v.

(*a*) Page 281, 2nd ed.

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Price (*a*), where the question was whether debt would lie on a promissory note payable by instalments, before the last day of payment had elapsed, Lord *Loughborough*, in delivering judgment says, "I cannot indeed devise a substantial reason why a promise to pay money not performed, does not become a debt, and why it should not be recoverable, eo nomine, as a debt. But the authorities are too strong to be resisted. Though the law has been altered with respect to actions of assumpsit, no alteration has taken place as to actions of debt." The principle is this, that debt or assumpsit will equally lie upon a parol contract, provided it be in respect of a specific sum of money; and an award is evidence of a contract to pay the sum awarded. In *Bacon's Abridgment*, tit. "*Debt*," (A), it is said, "an action of debt is said to be founded upon contract, either express, or implied; in which the certainty of the sum or duty appears, and therefore the plaintiff is to recover the same in numero, and not to be repaired in damages by the jury, as in those actions which sound only in damages; as assumpsit, trover, &c. And in *Comyn's Digest*, tit. "*Debt*," (A 8), it is said, "so debt lies upon every express contract to pay a sum certain: as if a man covenants or grants to pay." The ground on which debt lies for money awarded is, that the arbitrament is the judgment or decree of the person selected by both parties. Debt equally lies upon a contract by parol only, when the contract is to pay a sum certain. This is not such a contract. The mutual promise laid in this declaration refers to a period antecedent to that in which the award was made. The submission does not embrace the action only: if it did, the issue in the action would denote that an award in favour of the plaintiff directed the payment of a specific sum, and possibly there might be some ground for supporting this declaration; but the submission being of the cause of action and all matters in difference, it is obvious, that at the time the parties

(*a*) 1 H. Bl. 547.

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entered into the contract, they contemplated the possibility of the award directing some collateral act, which would have sounded in damages. The question as to whether an action will lie on a contract cannot depend upon the precise breach which may collaterally happen. In *Comyn's Digest*, tit. "*Arbitrament*," (I 2), it is said, "but in debt for a sum awarded, if the plaintiff shews a defective award, though more than he need to do, the declaration is bad:" "as if he shew an award of money on one part, and a release on the other part, when the submission was by parol, and, therefore, no remedy for the release." The consequence of introducing the present form of declaration would be this; that in assumpsit, it would be still requisite to shew an award good altogether; while in debt, it would be sufficient to shew an award good in part. Besides, if a question arose upon the Statute of Limitations, it would be impossible to say upon this declaration whether the case came within the 3rd section of the 3 & 4 Wm. 4, c. 42. If in substance this could be considered as an action of debt on an award, then the mutual promises are without meaning, and mere surplusage. Another objection is, that the action is by the assignees of an insolvent debtor, under the 51st section of the 1 & 2 Vict. c. 110; and it ought to appear that the submission to arbitration was with the consent, in writing, of the major part in value of the creditors.

Cowling, contrà. As to the objection that the declaration does not shew the consent of the majority of creditors, it will be found that the same clause was contained in the 7 Geo. 4, c. 57, s. 24; and in *Chitty's Statutes*, p. 596, there is a note which states, that "in a case from the Home Circuit, at Hertford, a similar clause in a former act as to bringing actions was considered by the Court of King's Bench as merely directory, and that the omission to convene a meeting was no bar to the action of the assignees." [*Pollock*, C. B.—Though the assignees may be responsible to the creditors, the reference is nevertheless

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valid.] In the case of *In re Warner and Others* (*a*), it was held to be no objection to an award that married women were parties to the submission, and that infant parties were also interested in the subject-matter of the arbitration. As to the principal point, it is clear from the precedents that debt will lie either on the award or submission. This is an action of debt on the submission, coupled with the award; a precedent for which will be found in 2 *Chit. Plead.* 298, 7th ed. The only difference between that precedent and the present declaration is, that in the latter there is an averment of mutual promises. [*Alderson*, B.—If you say that the mutual promises make no difference, why not strike them out?] Their insertion cannot alter the form of the action. [*Pollock*, C. B.—This is an action of debt on promises to perform an award before it is made, and the objection is, that debt will not lie on a promise to pay a contingent sum of money. If the averment of mutual promises were struck out, it would seem to be a good action of debt on the award.] In *Carpenter* v. *Thornton* (*b*), the Court seems to have thought that an action would lie on a promise to abide by an award. [*Alderson*, B.—If the mutual promise had been alleged after the making of the award, there would have been no objection.] The mutual promises are only what the law implies. [*Pollock*, C. B.—This declaration may be either on the promise to abide by the award, or on the award itself. The averments would apply to either case. You had better amend.]

Cowling consented to amend on the usual terms.

Amendment accordingly.

(*a*) *Ante*, vol. 2, p. 148.

(*b*) 3 B. & A. 52.

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DOE dem. GYDE *v.* ROE.

E. H. WOOLRYCH moved for judgment against the casual ejector. The declaration was intituled "Trinity Term, 9 Victoria," instead of the "8 Victoria;" but the notice, which was not dated, called upon the tenant to appear in next Michaelmas Term. He submitted that the notice, though not dated, would take effect from the time of service; and referred to *Doe* dem. *Woodroffe* v. *Roe* (*a*), where the Court of Common Pleas allowed a rule under similar circumstances.

Where a declaration in ejectment was intituled "Trinity Term, 9 Vict." instead of "Trinity Term, 8 Vict." and the notice, which was without date, required the tenant to appear in next Michaelmas Term; the Court granted a rule for judgment against the casual ejector.

PER CURIAM.—You are entitled to a rule.

Rule granted (*b*).

(*a*) 5 Scott, N. R. 800; See S. C. 4 M. & G. 810.

(*b*) See *Doe* d. *Yeomans* v. *Roe*, *ante*, vol. 2, p. 23; and *Doe* d. *Saunders* v. *Roe*, *ante*, vol. 1, p. 655; S. C. 12 M. & W. 556.

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ASSUMPSIT. The declaration stated, that before and at the time of the making of the promise hereinafter mentioned, the defendant and one W. Andrew were in

Assumpsit. The declaration stated that the defendant and A. were in partnership as attorneys,

and in consideration that the plaintiff would retain them as such attorneys, to conduct an action at the suit of B. against one L. for negligent driving, the defendant and his partner promised to fulfil their duty as such attorneys in and about prosecuting the said action, and recovering damages: it then alleged that the defendant and his partner did, under the said retainer, commence an action against L., and such proceedings were thereupon taken that B. recovered judgment against L. for 56*l.* 15*s.*: that afterwards the defendant and his said partner, *as such attorneys as aforesaid*, for obtaining satisfaction of the said damages, sued out a writ of fi. fa., to which the sheriff returned that he had levied 9*l.*, part of the damages, and nulla bona as to the residue; that the defendant and his said partner, *as such attorneys as aforesaid*, for obtaining satisfaction of the said residue, issued a ca. sa., by virtue whereof L. was imprisoned, and paid the residue of the damages to the governor of the gaol, who paid the same to the defendant and his partner, *as such attorneys as aforesaid:* that before they received the same they sent, as such attorneys as aforesaid, to the gaoler, a discharge of L. out of custody, by virtue whereof he was discharged. Breach: that although the defendant and his partner received the said damages, and the plaintiff duly paid to them as such attorneys as aforesaid their costs and charges of prosecuting the said action, yet they had not paid to B. or the plaintiff, the residue of the said damages. *Semble*, that the declaration was bad on special demurrer, for not alleging that the execution was sued out within a year and a day after judgment.

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partnership as attorneys; and thereupon heretofore, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant and his said partner W. Andrew, would retain and employ them as such attorneys as aforesaid, to prosecute and conduct a certain action, by and at the suit of one John Bevins, the father of the now plaintiff, against one S. Lowe, to recover damages for the injury sustained by the said John Bevins, by reason of the said S. Lowe having before then negligently driven a certain gig upon, against, and over the said J. Bevins, for certain reasonable fees and reward, to be therefore paid by the plaintiff to the defendant and his said partner, they the defendant and his said partner, then and long before the commencement of this suit, to wit, on, &c., promised the plaintiff to observe, perform, and fulfil their duty as such attorneys, in and about prosecuting the said action for the plaintiff, and in and about recovering damages for the said injury, and in relation thereto, and to do their duty as such attorneys as aforesaid in and about the premises: that in pursuance and part performance of the said promises, the defendant and his said partner did, under the said retainer of the now plaintiff, afterwards, to wit, on, &c., commence an action on the case against the said S. Lowe, at the suit of the said J. Bevins, in her Majesty's Court of Common Pleas at Westminster, to recover damages for the said injury so sustained by the said J. Bevins as aforesaid; and such proceedings were thereupon had and taken by the defendant and his said partner, under the said retainer of the now plaintiff in the said action, that afterwards, to wit, on the 19th day of May, A.D. 1841, by the consideration and judgment of the said Court, the said J. Bevins recovered against the said S. Lowe 56*l.* 15*s.*, which were adjudged to the said J. Bevins in and by the said Court, for his damages by him sustained, as well on occasion of the said grievance so complained of by him as aforesaid, as for his costs and damages by the said J. Bevins, about his suit in that behalf expended, whereof the said S. Lowe was convicted. And

the plaintiff further says, that afterwards, to wit, on, &c., the defendant and his said partner, *as such attorneys as aforesaid*, for obtaining satisfaction of the said damage so recovered as aforesaid by the said J. Bevins, sued and prosecuted out of the said Court of our said Lady the Queen, at Westminster aforesaid, a certain writ, called a writ of fieri facias, directed to the Chancellor of the county palatine of Lancaster, whereby our said Lady the Queen commanded the said Chancellor, that by her Majesty's writ under the seal of the said county palatine, to be duly made, and to be directed to the sheriff of the same county, the said Chancellor should command the said sheriff, that of the goods and chattels of the said S. Lowe in his the said sheriff's bailiwick, he should cause to be made the said sum so recovered by the said J. Bevins as aforesaid, for his damages aforesaid, to wit, 56*l.* 15*s.*, together with interest on the said last mentioned sum, at the rate of 4*l.* per cent. per annum from a certain day, to wit, on, &c. By virtue of and in obedience to which said writ, the said Chancellor did afterwards, to wit, on, &c., by her Majesty's writ, under the seal of the said county palatine, duly made and directed to the sheriff of the said county of Lancaster, command the said sheriff to do all things as by the said writ so directed to the said Chancellor as aforesaid, he was commanded to command the said sheriff. To which said writ of fieri facias so directed as aforesaid, he the said sheriff afterwards, to wit, on, &c., returned to the justices of the said Court of our said Lady the Queen at Westminster, that by virtue of the said writ, he the said sheriff had caused to be made of the goods and chattels of the said S. Lowe within his the said sheriff's bailiwick, a certain sum, to wit, 9*l.* 4*s.* 2½*d.*, part of the said damages so recovered as aforesaid, and that the said S. Lowe had not any more goods or chattels in his the said sheriff's bailiwick, whereof he could levy the residue of the said damages, or any part thereof: that thereupon afterwards and before the commencement of this suit, to wit, on, &c.,

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the defendant and the said W. Andrew, *as such attorneys as aforesaid*, for obtaining satisfaction of the said residue of the said damages so recovered as aforesaid, sued and prosecuted out of the said Court of our said Lady the Queen at Westminster aforesaid, a certain other writ of our said Lady the Queen, called a capias ad satisfaciendum, directed to the Chancellor of the said county palatine of Lancaster, whereby our said Lady the Queen commanded the said Chancellor, that by the writ of our said Lady the Queen, under the seal of the said county palatine to be duly made, and to be directed to the sheriff of the said county, the said Chancellor should command the said sheriff to take the said S. Lowe, if he should be found in his the said sheriff's bailiwick, and him safely keep, so that the said Chancellor might have the said S. Lowe's body before the said justices at Westminster, immediately after the execution of the said last mentioned writ, to satisfy the said J. Bevins for the residue of the said damages and interest aforesaid, to wit, 47*l.* 10*s.* 9½*d.* By virtue of, and in obedience to which said last mentioned writ, the said Chancellor afterwards, to wit, on, &c., by her Majesty's writ, under the seal of the said county palatine, duly made and directed to the sheriff of the said county of Lancaster, did command the said sheriff to take the said S. Lowe, and to do all things as by the said writ so directed to him as aforesaid, the said Chancellor was commanded to command the said sheriff. And the said writ was afterwards, and before the delivery thereof to the said sheriff, duly indorsed with an indorsement, directing the said sheriff to take the said S. Lowe to satisfy the said damages, to wit, 47*l.* 10*s.* 9½*d.*, and a certain sum, to wit, 3*l.* 10*s.*, for the costs of the said writ, besides sheriff's poundage and lawful expenses; and the said writ was afterwards, and before the commencement of this suit, to wit, on, &c., delivered by the defendant and his said partner to the said sheriff, so indorsed as aforesaid, to be executed in due form of law. And the said sheriff afterwards, to wit, on, &c., in obedience

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to and by virtue of the said writ, took and arrested the said S. Lowe by his body, and detained and had him in his custody under the said writ, for the said residue of the said damages and interest aforesaid, and afterwards, to wit, on, &c., the said S. Lowe was, under and by virtue of the said writ, imprisoned and detained in prison in a certain gaol, to wit, Lancaster Castle: that the said S. Lowe so being in custody as aforesaid, afterwards, to wit, on, &c., paid the remainder of the said residue of the said damages and interest, and the said costs and expenses, for which he was so detained in custody as aforesaid, to wit, 57*l.* 0*s.* 9½*d.*, to the governor of the said gaol, to wit, one James Hanbrow, who afterwards, and long before the commencement of this suit, to wit, on, &c., paid the same to the defendant and the said W. Andrew *as such attorneys as aforesaid*, and the defendant and the said W. Andrew, as such attorneys as aforesaid, then and before the commencement of this suit, to wit, on, &c., had took, accepted, and received the same: that the defendant and the said W. Andrew, before they so accepted and received the said residue of the said damages and interest, costs and expenses, to wit, 57*l.* 0*s.* 9½*d.*, wrote and sent as such attorneys as aforesaid, to the gaoler in whose custody the said S. Lowe then was, to wit, the governor of the said gaol, a discharge of the said S. Lowe out of the said custody. By virtue of which said discharge the said S. Lowe was afterwards, and before the payment of the said residue of the said damages, interest, costs and charges to the defendant and the said W. Andrew as aforesaid, as such attorneys as aforesaid, and long before the commencement of this suit, to wit, on, &c., released and discharged from the said custody. Nevertheless, the plaintiff saith, that although the defendant and the said W. Andrew as such attorneys as aforesaid, so had, took, accepted, and received the said residue of the said damages, interest, costs and charges as aforesaid, and although the now plaintiff, before they so had, took, accepted, and received the same as aforesaid, to wit, on, &c., duly paid to them

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the defendant and the said W. Andrew, as such attorneys as aforesaid, their costs and charges of prosecuting the said action against the said S. Lowe, amounting to a large sum, to wit, the sum of 32*l.* 9*s.* 5*d.*: yet the defendant and the said W. Andrew have not, nor has either of them, paid to the plaintiff, or to the said J. Bevins, or to any other person, the said sum so accepted and received by them as aforesaid, as and for the said residue of the said damages and interest, costs and charges as aforesaid; nor have the defendant and the said W. Andrew, or either of them, accounted to or with the ~~defendant~~ plaintiff, or the said J. Bevins, or any other person, for the said last mentioned money, or any part thereof.

Special demurrer, assigning for causes, amongst others, that the declaration did not shew any breach of promise, inasmuch as the ~~debts retained were~~ determined with the judgment; and that it did not appear that the plaintiff had any authority from J. Bevins, or was entitled to recover the said damages and costs.

Crompton, in support of the demurrer. The alleged breach of duty is not brought within the terms of the promise, inasmuch as the retainer was at an end before the time of the act complained of. It appears by the record that the defendant did recover the damages, and that S. Lowe was in gaol at the suit of the plaintiff. [*Pollock*, C. B.—The words of the declaration are, "in and about the recovery of damages, and in relation thereto," that is, in paying over the damages recovered.] An attorney has only a limited power to sue out execution within a year and a day after judgment; *Tidd's Practice*, 93, 9th ed.; *Savory* v. *Chapman* (*a*). In *Tipping* v. *Johnson* (*b*), which was an application to set aside an execution because it was sued out by a different attorney from the one who had been attorney in the cause, *Heath*, J., said, "that it appeared by

(*a*) 11 A. & E. 829; S C. 3 P. & D. 604; 8 Dowl. 656.
(*b*) 2 B. & P. 357.

several cases collected in *Rol. Abr.* (*a*), that the authority of an attorney determines with the judgment and therefore no order to change the attorney was necessary." A promise in relation to a judgment, does not necessarily apply to the execution. It might be that the two attorneys were retained to bring the action, and that after the dissolution of partnership, Andrew was employed to recover the money. The declaration shews no liability arising from the retainer, which would only exist for a year and a day. The duty alleged is to recover the money, and that appears to have been done. Further, it is not shewn that the plaintiff had any authority from J. Bevins to receive the money, and if the defendant had paid it, he might still be liable to J. Bevins; *Robson* v. *Eaton* (*b*). Unless the plaintiff have some interest, he cannot maintain the action; *Stanley* v. *Jones* (*c*).

Prideaux, contrà. A writ of execution issued on a judgment more than a year old, is not absolutely void, but voidable only; *Blanchenay* v. *Burt* (*d*). It is clear that the retainer of an attorney extends to the time of final judgment, and he would be guilty of a breach of duty if he did not prosecute the suit to judgment. It is also established, that a retainer to conduct a suit, authorizes the attorney to levy execution. [*Parke*, B.—It is not averred that he sued out the process on the former retainer. The words "as such attorney," are ambiguous, and may mean either as attorney on the former retainer, or as attorney under a new retainer.] The attorney in the cause is the proper person to receive the fruits of the execution; *Crozer* v. *Pilling* (*e*). The allegation that the plaintiff paid the defendant all his costs, shews that the costs were those which accrued upon the retainer. The Court will not presume that there was any

(*a*) Vol. 1, fol. 291.
(*b*) 1 T. R. 62.
(*c*) 7 Bing. 369; S. C. 5 M. & P. 193.
(*d*) 4 Q. B. 707; S. C. 3 G. & D. 613.
(*e*) 4 B. & C. 34; S. C. 6 D. & R. 26.

1845.

BEVINS v. HULME.

new contract; and if there were, that fact should have been shewn by the defendant. [*Parke*, B.—There is a case in *Styles* (*a*), *Lawrence* v. *Harrison*, in which *Roll*, C. J., says, "the only question is, whether the warrant of attorney be determined by the judgment given in the suit wherein he was retained; and I conceive that it is not, for the suit is not determined, for the attorney after the judgment is to be called to say why there should not execution be made out against his client, and he is trusted to defend his client as far as he can from the execution."] *Tipping* v. *Johnson* (*b*) is only an authority to this extent, that the plaintiff may, after final judgment, change his attorney, without an order of the Court. *Savory* v. *Chapman* (*c*) only decides, that in an action against the marshal for an escape, it is not sufficient to plead that the attorney for the plaintiff authorised the marshal to discharge the prisoner, without shewing either that the plaintiff had given express authority, or that the debt was paid. In *Jenkin's Reports*, case C (*d*), it is said, "the plaintiff's attorney, after judgment in debt, cannot acknowledge satisfaction within the year; for as to that his warrant expires by the judgment: but his warrant continues as to suing execution within the year." In an anonymous case in *Modern Reports* (*e*), it was decided, "that after judgment the attorney on record may receive and acknowledge satisfaction, by virtue of his former warrant." In the *Second Institute* (*f*), Lord *Coke* says, "by the judgment against the defendant, the warrant of attorney is determined; for thereby placitum terminatur, but only to sue execution (which is the fruit of the judgment), within the year: and if he sue out execution within the year, he may prosecute the same after the year; but if he sue out no execution within the year, then after the year is ended after judgment, his warrant of attorney is determined."

(*a*) Page 426.
(*b*) 2 B. & P. 357.
(*c*) 11 A. & E. 829; S. C. 3 P. & D. 604; 8 Dowl. 656.
(*d*) Page 53.
(*e*) Vol. 12, p. 440.
(*f*) Page 378.

Crompton, in reply, referred to *Com. Dig.*, tit. "*Attorney*," (B. 10) where it is said, that the authority of an attorney determines by the judgment. [*Parke*, B.—I much question whether that proposition be correct, indeed there are some authorities cited in *Lush's Practice*, p. 220, which shew it to be otherwise.]

Cur. adv. vult.

POLLOCK, C. B., on a subsequent day, said, that as the Court were not agreed in opinion as to the sufficiency of the declaration, they would recommend that the defendant should withdraw his demurrer, and the plaintiff amend his declaration, by alleging, that the execution issued within a year and a day after the judgment.

Amendment accordingly.

COURT OF QUEEN'S BENCH.

Michaelmas Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

1845.

Assumpsit. The declaration alleged that "there had been and then were, divers accounts between the plaintiff and the defendant, which accounts were open and unsettled," and that there were divers disputes between the plaintiff and the defendant touching the said accounts, and that the plaintiff claimed of the defendant that he was indebted to him in a large sum of money, and that the defendant

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ASSUMPSIT. The first count of the declaration stated, that whereas heretofore, to wit, on the 23rd day of June, in the year of our Lord 1837, there had been and then were, divers accounts between the plaintiff and the defendant, which accounts were open and unsettled; and there were then divers disputes between the plaintiff and the defendant touching and concerning the said accounts; and the plaintiff then claimed of the defendant, that the defendant was indebted to the plaintiff in divers large sums of money, amounting together to the sum of, to wit, 500*l.*; and the defendant then claimed of the plaintiff, that he, the plaintiff, was indebted to the defendant; and thereupon it was then agreed, by and between the plaintiff and defendant, that they should respectively give up their respective claims each upon the other; and thereupon in consideration thereof, and that the plaintiff, at the request of the defendant, would give up, relinquish, and forbear to prosecute, to and

claimed of the plaintiff that he the plaintiff was indebted to the defendant; and then that it was agreed that each party should withdraw his claim, and that the defendant should pay the plaintiff an annuity of 6*l.* for life. It then alleged, that in consideration that the plaintiff would withdraw his claim, the defendant promised to pay the annuity. Breach, non payment of the annuity. Plea, non assumpsit: *Held*, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration on which to maintain an assumpsit on the defendant's promise.

against him the defendant, all claims and demands whatsoever which he the plaintiff then had upon or against the defendant; he the defendant then promised the plaintiff to pay him, the plaintiff, during the lifetime of him the said plaintiff, a certain yearly sum of, to wit, 6*l.*, at and upon, to wit, the 23rd day of June in each and every year, during the lifetime of him the said plaintiff; and the plaintiff avers, that although he hath performed all things by him to be done in pursuance of the said agreement and of his said promise, and hath given up, relinquished, and ceased and forborne to prosecute against the defendant the said claims and demands of him the plaintiff in that behalf; yet the defendant, disregarding his said promise, hath not paid to the plaintiff the said yearly sum of 6*l.* or any part thereof; but hath hitherto wholly neglected and refused so to do; and, on the contrary thereof, a large sum of money, to wit, the sum of 6*l.*, of the said yearly sums of money for one year ending on a certain day, to wit, on the 23rd day of June, in the year of our Lord 1842, and then last elapsed, then became and was, and now is, due and in arrear, and unpaid from the defendant to the plaintiff, contrary to the said promise.

The defendant pleaded the general issue.

At the trial, which took place on the 29th of last April, before the under-sheriff of Breconshire, a verdict was returned for the plaintiff, with leave to the defendant to move to enter a nonsuit, on the ground that there was no such consideration stated in the declaration.

A rule nisi had been accordingly obtained (*a*) to arrest the judgment, or for a nonsuit, or a new trial (*b*).

Peacock now shewed cause. It is submitted that this declaration discloses a sufficient consideration for the defendant's promise. It is stated in the inducement which is

(*a*) In Easter Term last.

(*b*) The rule was obtained in the alternative for a nonsuit, or for a new trial, in case the declaration should be held to be good after verdict.

1845.

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admitted on the record, that there had been and then were, divers accounts open and unsettled between the plaintiff and the defendant, and that the plaintiff claimed divers sums from the defendant, and that in consideration thereof, and that the plaintiff, at the request of the defendant, would forbear to prosecute against the defendant these claims, the defendant made the promise stated in the declaration. That is a sufficient consideration, and the case differs from one where the only consideration is the foregoing of disputes and controversies as to whether any sum is owing between the parties. Here it appears that there have been accounts between the parties which remain unsettled, and that the plaintiff claimed certain sums from the defendant. The allegation that the plaintiff claimed certain sums from the defendant, taken in conjunction with the statement that there were accounts unsettled between the parties, is equivalent to an allegation by the plaintiff that a debt was due from the defendant to him. If so, then the giving up the claim in respect of that debt is a sufficient consideration for the promise.

E. V. Williams, in support of the rule. Whatever doubt may have formerly existed on this subject, it is now sufficiently clear that the mere giving up a claim to a debt, without shewing that a debt exists, is not a sufficient consideration on which to found an assumpsit. In *Longridge* v. *Dorville* (*a*) it was held, that the giving up a suit instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum. But there a suit was actually pending, and the plaintiff might have sustained some detriment by giving up all claim in respect of the expenses incurred, and the defendant have derived some benefit, by having that suit put an end to, without further trouble or investigation. Here, however, there is no allegation of the existence of a

(*a*) 5 B. & A. 117.

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debt, but only that the plaintiff "claimed" a debt as owing to him. That a party "claims" a debt, raises no presumption that the money is owing to him. The claim may be perfectly unfounded. It is true that it is alleged that there were accounts open and unsettled between the parties, but it does not say which party was debtor. The plaintiff, therefore, may have been the debtor to the defendant; and, if so, his claim against the defendant could not be rested on the state of the accounts between the parties. There is, however, a case which is very much in point with the present. In *Edwards* v. *Baugh* (*a*), the declaration alleged that certain *disputes* and *controversies* were pending between the plaintiff and the defendant, whether the defendant was indebted to the plaintiff in a certain sum of money; and it was held upon demurrer, that it disclosed no sufficient consideration on which to maintain the action; and Lord *Abinger*, C. B., in delivering judgment, drew the distinction between foregoing a dispute as to the *existence* of a debt, and foregoing a dispute as to the *amount* of it. The true rule is, as is laid down by *Rolfe*, B., in the same case, that "the plaintiff is bound to shew a consideration, in the shape of something either beneficial to the opposite party, or detrimental to himself." Here there is nothing beneficial to the defendant, for the claim may have been unfounded; nothing detrimental to the plaintiff, for the giving up an unfounded claim could have been no injury to him.

Peacock referred to the case of *Smith* v. *Monteith* (*b*).

Cur. adv. vult.

PATTESON, J.—This case appears to me to be very distinguishable from that of *Edwards* v. *Baugh*, upon the

(*a*) 11 M. & W. 641; S. C. *ante*, vol. 1, p. 304.

(*b*) 13 M. & W. 427; S. C. *ante*, vol. 2, p. 358.

1845.

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authority of which the learned counsel for the defendant relied. There the declaration merely stated that disputes existed between the plaintiff and defendant whether the defendant was indebted to the plaintiff; which might be true, although they might have been entire strangers to each other, and never have had any transactions together. If so, the ending of such disputes could neither be detrimental to the plaintiff, nor beneficial to the defendant. Here, on the contrary, the declaration states as a substantive fact, which might have been traversed by the defendant, that there had been, and were, mutual accounts between the plaintiff and defendant, which were open and unsettled. It then states in substance that each party claimed the balance, and that it was agreed that each party should withdraw his claim, and that the defendant should pay the plaintiff an annuity of 6*l.* for his life. It then states, that in consideration that the plaintiff would withdraw his claim, the defendant promised to pay the annuity. Here is a plain detriment to the plaintiff in foregoing his claim to the balance; a claim which was not made against a stranger, but which had a probable foundation arising from mutual accounts between the parties, which are admitted to have been open and unsettled.

Under these circumstances, I am of opinion that a valid consideration for the defendant's promise appears on the face of this declaration, and that the rule obtained in this case must be discharged.

Rule discharged.

1845.

TOWNSEND and Another, Assignees *v.* JAMES SMITH.

To debt on a replevin bond, setting out the record in the former action, the defendant pleaded nul tiel record, with a conclusion to the country: *Held*, that the plaintiff was not bound to demur; but might treat the conclusion as surplusage; and reply, taking issue on the plea of nul tiel record in the ordinary form.

DEBT on a replevin bond against the defendant, as a co-surety with one Henry Smith; the condition of which bond was, that one William Smith should prosecute his suit with effect, and without any delay, against the now plaintiffs, who were defendants in that suit. The declaration then set out the pleadings in the former suit, and averred that "such proceedings were thereupon had in the said plea, in the said Court of our said Lady the Queen herself at Westminster aforesaid, that afterwards, to wit, on the 21st day of August, in the ninth year of the reign of our said Lady the Queen, before the Queen herself, it was considered and adjudged by the same Court, that the said William Smith should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, &c., and that the now plaintiffs should go thereof without day; as by the record and proceedings thereof now remaining in the said Court of our said Lady the Queen, before the Queen herself at Westminster aforesaid, more fully appears," &c.

Plea. That there is not any such record remaining in the said Court of our said Lady the Queen, before the Queen herself, in manner and form as the plaintiffs have above in that behalf alleged. And of this the defendant puts himself upon the country, &c.

Replication. That there is such a record of the said judgment remaining in the said Court of our said Lady the Queen, before the Queen herself, at Westminster aforesaid, as the plaintiffs have above alleged. And this the plaintiffs are ready to verify by the said record, &c. And they pray, &c. But because, &c., a day is therefore given, &c.

[The defendant returned the issue and notice of production of the record, and gave notice that he retained the

1845.

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replication as a replication only; and delivered the following demurrer.]

Special demurrer. That the issue above tendered by the defendant being well tendered, should have been accepted by the plaintiff: that the replication prevented the defendant from availing himself of the proof of such of the matters of fact involved in that issue as were cognizable only by a jury: that whether the said issue above tendered by the defendant were well or ill tendered, the plaintiffs were bound either to have accepted it, or to have demurred; and could not, according to the rules of pleading, plead over as they had done, in and by their said replication: and that the replication caused a discontinuance in this action.

Fitzherbert had obtained a rule calling upon the defendant to shew cause why the above demurrer should not be set aside as frivolous and irregular, and why the plaintiffs should not be at liberty to sign judgment as for want of a plea; or why the issue joined by the plaintiffs should not be tried by the production of the record, pursuant to the plaintiff's notice. He referred to *Tipping* v. *Johnson* (*a*); *Anon.* (*b*); 1 *Wms. Saund.* 92, *n.* [*e*], *6th ed.*, and the authorities as collected in a note to the case of *Attwood* v. *Taylor* (*c*).

Rawlinson shewed cause. The defendant tendered an issue, which the plaintiffs were bound to have accepted, or to have demurred to. In *Stephen on Pleading*, p. 265, *4th ed.*, the rule is laid down, that "the party has no option in accepting the issue, when well tendered;" and that "if the opposite party think the traverse bad in substance or in form, or object to the mode of trial proposed, in either case he is not obliged to add the similiter, but may demur;

(*a*) 2 B. & P. 302.
(*b*) 2 Chitt. Rep. 241.
(*c*) 1 M. & G. 288, n. (*a*).

and if it has been added for him, may strike it out and demur." In a note to the foregoing passage, it is added, "but he cannot plead over;" and for this, the case of *Whitehead* v. *Buckland* (*a*) is cited, where *Roll*, C. J., says, the plaintiff "must either demur or join issue with you; and I have not heard of passing over in this case, as may be done in the case of a traverse," (meaning a traverse with an absque hoc); and the case of *Campbell* v. *St. John* (*b*), where the Court, of which *Holt*, C. J., was a member, say, that pleading over when issue is offered, is a discontinuance. But even supposing the plaintiffs could plead over, such pleading over would cure any defect in the defendant's plea. The defect in the plea then being cured, the replication is ill, for not accepting the issue to the country tendered by it. As to that part of the rule which asks for leave to sign judgment as for want of a plea, that might have been the proper subject of a motion to a Judge at Chambers, before replication; but the plaintiffs having now replied, cannot turn round and say that the plea is no plea at all. He referred also to *House* v. *Launder* (*c*), and *Praed* v. *The Duchess of Cumberland* (*d*).

Fitzherbert, in support of the rule. The defendant's object in pleading this plea is obvious. He sought to induce the plaintiffs to demur, but the plaintiffs having declined to take advantage of the defect offered, he now attempts to demur to the plaintiffs' replication, on the novel ground that the plaintiffs have failed to object to the informality of his former pleading. It may be conceded, that where an issue is well tendered, it must be taken, and that the opposite party cannot plead over; but here there was no issue well tendered; and the conclusion to the country, which was clearly informal, might be rejected by the plaintiffs as surplusage. The plea was a good plea

(*a*) Style, 402.
(*b*) 1 Salk. 219.
(*c*) 1 Lev. 85; S. C. 1 Keb. 414.
(*d*) 4 T. R. 585.

1845.

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without any conclusion either to the country, or with a verification; being a plea merely in the negative, and not containing an averment of any affirmative matter whatever; *Bodenham* v. *Hill* (*a*). In that case, the defendant pleaded non assumpsit infra sex annos, and concluded with a prayer of judgment, but omitting any verification; and the Court of Exchequer, on special demurrer, held the plea good. If this verification by the country be mere surplusage, as it is submitted it is, then the plaintiff could only have taken advantage of it by special demurrer; 1 *Saund.* 103, *n.* 3, *6th ed.*; and an anonymous case in *Salkeld's Reports* (*b*), shews that whenever a fault in a pleading is available on special demurrer only, the defect is aided by the opposite party pleading over. Besides, the Court will take notice that this being one of its own records, the mode of trial could not possibly have been by the country; and the plea being in point of fact in the nature of a sham plea, the Court, for the sake of justice, will discourage such attempts, and grant the present motion; *Solomons* v. *Lyon* (*c*). [*Patteson*, J.—Do you contend that where a plea alleges new matter, and concludes to the country, the plaintiff may reply, and disregard the conclusion altogether?] Yes, if the plea contain a verification, and afterwards conclude to the country.

PATTESON, J.—That I think is the true way of viewing the question. The plea here was sufficient without the conclusion to the country, which may therefore be rejected as surplusage. I do not mean to say that wherever a pleading has a wrong conclusion, the opposite party may disregard it and plead over. Here the plea has not a wrong conclusion simply. It is a sufficient plea without that conclusion, which is therefore mere surplusage.

Rule absolute.

(*a*) 7 M. & W. 274; S. C. 8 Dowl. 862.

(*b*) Vol. 2, p. 519.

(*c*) 1 East, 369.

1845.

MATTHEWSON and Another *v.* BAISTOW.

THIS was a motion for judgment as in case of a nonsuit.

An affidavit sworn in London, described the party making it as the "agent for the defendant in this cause:" *Held* sufficient.

2 Dnd. 332.

Bovill took a preliminary objection, that the affidavit on which the rule was moved was made by "James Wright, of No. 8, New Inn, Strand, in the county of Middlesex, agent for the defendant in this cause." He contended that this was not a sufficient description of the party making the affidavit.

Cole, contrà. "Agent" is a well known term, and "agent for the defendant" means the defendant's "London agent." [*Patteson*, J.—Where is the affidavit sworn?] At the Judge's Chambers in London.

PATTESON, J.—As the affidavit is sworn in London, I think I must take the description to be sufficiently clear, and that it means the London agent of the defendant. It might, perhaps, have been otherwise, had the affidavit been sworn in the country.

Bovill then shewed cause against the rule.

Cole was heard in support of the rule.

PER CURIAM.

Rule discharged on a peremptory undertaking.

1845.

DOE dem. WILLIAMSON and Another *v.* ROE.

Where judgment had been signed against the casual ejector: *Held*, that the tenant had no locus standi in Court before appearance, to object to the validity of the description of the premises in the declaration.

The jurat of an affidavit purported to be "sworn in Court this 9th day of November, 1845:" *Semble*, that as the 9th of November, 1845, was a Sunday, the jurat was defective.

THIS was an action of ejectment. The declaration contained two counts, on separate demises. In the second count there was no description of the premises claimed. A rule for judgment against the casual ejector having been obtained, a rule nisi was afterwards obtained on the part of the tenant in possession, to rescind that rule, or to set aside the declaration served on the tenant in possession, or to strike out the second count thereof, with costs; upon an affidavit purporting to be "sworn in Court, this 9th day of November, 1845."

Hayes shewed cause, upon an affidavit that there had been no appearance entered in the action of ejectment. There are several preliminary objections to this rule. First, as to the jurat of the affidavit on which the rule was obtained. It purports to be "sworn in Court this 9th of November, 1845." Now, the 9th of November, 1845, was a Sunday; and, if the Court is to assume the jurat to be true, then it will appear to have been sworn on a dies non juridicus, and no indictment for perjury would lie if its contents were false. If it is to be assumed to be incorrect, and the Court will of its own knowledge take notice that it did not sit on that day; then it is in the position of a jurat without date, or with an impossible date. Writs of summons have been set aside as void, because dated on a Sunday (*a*), and bills of Middlesex, because returnable on a Feast-day (*b*); and the case of *Swann* v. *Broome* (*c*), shews that the Court does not sit on Sundays, and that it is dies non juridicus as regards awarding any judicial process, or exercising any judicial functions. Another objection is, that

(*a*) See *Hanson* v. *Shackelton*, 4 Dowl. 48.

(*b*) See *Kenworthy* v. *Peppiat*, 4 B. & A. 288.

(*c*) 3 Burr. 1595.

1845.

Doe dem. WILLIAMSON v. ROE.

the tenant is no party to this action, and cannot be heard with respect to it, until he has appeared and entered into the consent rule. He referred to a case of *Doe* d. *King William the Fourth* v. *Roe* (*a*), where the Court of Exchequer had been moved on behalf of some of the tenants, who had not appeared in the action, to strike out some of the demises in the declaration in which the lessors of the plaintiff appeared to be dead, and for leave to the tenants to appear and plead to the residue of the action. But that Court refused, without some authority in favour of the motion, to hear the application of parties who had not appeared; saying, that the only parties then before the Court were John Doe and Richard Roe. The only ground upon which the Court has interfered to set aside a judgment by default against the casual ejector, has been where the application has been to be allowed to appear and plead to the action on an affidavit of merits; or where the application is to stay the action on the ground of a former action defeated, and the costs remaining unpaid (*b*). Even an application on the part of the lessors of the plaintiff to amend the declaration, cannot be entertained until the tenant has appeared; *Doe* d. *Street* v. *Roe* (*c*). [He then proceeded to argue, that even if the Court could entertain the application, the declaration was sufficient; but as no judgment was given on this point, the argument on both sides is omitted.]

Lush, in support of the rule. If the Court can sit on a

(*a*) 13 Law Journal Reports, N. S. Exch. p. 304.

(*b*) In *Adams on Ejectment*, p. 360, 3rd ed., in speaking of a rule to stay proceedings in a second action for the same premises, it is said, "there is no particular stage of the proceedings, in which it is necessary to move the Court, or take out a summons for this rule. It will be granted even before the defendant has appeared: and it always should be moved for as early in the action as it conveniently can be." See *Doe* d. *Feldon* v. *Roe*, 8 T. R. 645; and *Doe* d. *Standish* v. *Roe*, 5 B. & Ad. 878; S. C. 2 N. & M. 468.

(*c*) 8 Dowl. 444.

1845.

Doe dem. WILLIAMSON v. ROE.

Sunday, then the jurat is sufficient; if it cannot, the mistake is but the misprision of its officer, for which the parties shall not suffer. This is a different case to that of a defective jurat in an affidavit taken before a commissioner, as there jurisdiction must be shewn. Here it is the act of the Court, and the mistake of its officer shall not prejudice the parties. [*Patteson*, J.—It is surely every day practice to reject affidavits which are defective in their jurat.] *Hayes* referred to *Blackwell* v. *Allen* (*a*). [*Patteson*, J.—I think that I am bound to take notice that the Court does not sit on a Sunday, and that therefore the date of the jurat is defective. In the mean time, however, I will hear you on the other point, as to the right of the tenant to make this application before appearance.] The case of *Doe* d. *King William the Fourth* v. *Roe* (*b*), is not to be found in any other report, and no authority seems there to have been cited. There must certainly be some means by which the tenant can take advantage of such a defect as the present. If he had appeared, the plaintiff might have delivered a new declaration, which he would have been bound to accept. In *Doe* d. *Churchwardens of Llandesilio* v. *Roe* (*c*), where the ejectment was brought by the churchwardens and overseers of a parish, and the declaration contained two sets of counts, one specifying the names of the churchwardens and overseers, and the other not, the Court granted a rule to strike out the first set of counts; and there the application must have been before appearance, as is evident from the title of the cause. This is a defect that would be sufficient in arrest of judgment, and the question is, whether the party is not entitled to be heard now.

PATTESON, J.—The case of *Doe* d. *King William the Fourth*, which has been cited, seems to me, if correctly reported, to be precisely in point, and I do not see how I

(*a*) 7 M. & W. 146.
(*b*) 13 Law Journal Rep. N. S. Exch. p. 304.
(*c*) 4 Dowl. 222.

can grant this application without acting expressly contrary to the decision in that case.

1845.

Doe dem. WILLIAMSON v. ROE.

Cur. adv. vult.

On a subsequent day,

PATTESON, J.—I have looked into the case of *Doe* d. *King William the Fourth* v. *Roe*, and I find that it is so directly in point upon the present occasion, that supposing I had any doubt, which I have not, as it is a decision of the full Court, I should not feel myself justified in deciding against it. As, however, it appears to me not unreasonable to suppose that this case has escaped attention, and as there is another case in this Court in which no such objection was taken (*a*), I think, that under these circumstances, the rule must be discharged, but without costs.

Rule discharged accordingly (*b*).

(*a*) 4 Dowl. 222.

(*b*) The case of *Doe* d. *Simpson* v. *Roe*, 6 Dowl. 469, was not brought under the notice of the Court, where, on motion to set aside a declaration in ejectment for not containing in it an attorney's name, Mr. J. *Patteson* said, "If the tenant has appeared, the objection is cured. If he has not appeared, he cannot be admitted to take the objection," and accordingly refused the rule.

ADAM v. ROWE.

ASSUMPSIT. The declaration contained three counts. The first was for goods sold and delivered; the second for

Assumpsit. The declaration contained counts for goods sold and delivered, for money had and received, and for money due on an account stated. The defendant pleaded, 1. Except, &c., non assumpsit. 2. As to the sum excepted, tender. 3. Except, &c., set-off. 4. Except, &c., payment. On these pleas issue was joined. At the trial, a verdict was taken by consent for the plaintiff, subject to the certificate of an arbitrator, who made his certificate in the following terms: "As to the issues *firstly*, thirdly, and lastly joined between the parties in the said cause, I do find and certify that the verdict so found as aforesaid ought to stand, and that the same shall and do stand upon and so far as the same relates to the said first, third, and last issues:" *Held*, on motion to set aside the above certificate, that the "issue *firstly* joined" meant the issue of non assumpsit to the whole declaration; and that it was not necessary to find separately on the issue of non assumpsit as to each count.

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money had and received; and the third for money due on an account stated.

The defendant pleaded, 1. Except as to 29*l.* 11*s.* 1*d.*, non assumpsit. 2. As to that sum, tender. 3. Except as to that sum, set-off. 4. Except as to that sum, payment before action brought.

On these pleas, issue was joined.

On the cause coming on to be heard before *Williams*, J., at the sittings in last Hilary Term, a verdict was found for the plaintiff by consent, damages 80*l.*, and costs 40*s.*, subject to the award or certificate of order, arbitrament, final end and determination of a gentleman at the Bar, to whom all matters in difference in the cause were referred, to order and determine what he should think fit to be done by the parties respecting the matter in dispute; and that the costs of the cause, and the costs of the reference and award, or certificate, should abide the event and determination of the said award or certificate. The arbitrator made his certificate of and concerning the matters and premises to him referred as aforesaid, in the following terms: "As to the issues firstly, thirdly, and lastly joined between the said parties in the said cause, I do find and certify, that the verdict so found as aforesaid, ought to stand, and that the same shall and do stand upon, and so far as the same relates to the said first, third, and last issues; but that the amount of the verdict be reduced from the sum of 80*l.*, to the sum of 3*l.* 18*s.* 11*d.* And as to the issue secondly joined in the said cause between the said parties, I do find and certify for and in favor of the defendant, and I find and certify that the verdict so found for the plaintiff as aforesaid, so far as the same relates to the said second issue, ought to be set aside, and a verdict on the said second issue entered in lieu thereof for the defendant, and that the same be done accordingly."

A rule having been obtained, calling on the plaintiff to shew cause why the award made between the parties should not be set aside, on the ground that the arbitrator had not

adjudicated upon each of the issues raised, and that the award was, therefore, not final.

Mellor shewed cause. It is submitted that the certificate is good. It is said, that the first issue on non assumpsit, contains in reality three issues; one on each count in the declaration; and that the arbitrator should have found on each of these issues: and the case of *Kilburn* v. *Kilburn* (*a*), is relied on as supporting this objection. Although that case may seem to be against the validity of this certificate, there is this strong distinction to be drawn, that there the arbitrators awarded a certain sum to be due, and that judgment should be entered for that sum, but did not find on any of the issues specifically. Here the arbitrator has specifically found, as to the issue firstly above joined, which is the issue of non assumpsit, that the verdict should stand for the plaintiff. Now, whether the plea of non assumpsit contains a denial of one or of several promises, the arbitrator has equally found that issue or issues for the plaintiff. In *Stonehewer* v. *Farrar* (*b*), this Court guarded itself against being supposed to hold that the arbitrator must in terms find each issue. If from his award it may be clearly inferred, that a substantial finding on the issue exists, that is sufficient. In *Cooper* v. *Langdon* (*c*), the arbitrator found a general verdict for the defendant, and the Court held, that that was a sufficient determination of the several issues in that cause.

Lush, in support of the rule. The question is, whether the present case can be distinguished from *Kilburn* v. *Kilburn*, and it is submitted, that the judgment in that case, applies equally to a case like the present. There the Court said, "the difficulty as to the plea of non assumpsit

(*a*) *Ante*, vol. 2, p. 633; See S. C. 13 M. & W. 671.

(*b*) Q. B. Hil. Term, 1845.

(*c*) 9 M. & W. 60; S. C. 1 Dowl. 392, N. S.

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GREVILLE *v.* SPARDING and Another.

Where issue is joined on error in fact, the defendant is entitled to costs of the day for not proceeding to trial, as in other cases.

BARSTOW moved for the costs of the day for not proceeding to trial in the above cause, pursuant to notice. Issue upon error in fact had been joined between the parties on the fourth of April last; and the plaintiff had given notice of trial for the sitting after Trinity Term; but had then withdrawn the record.

The practice is, that this is a rule absolute in the first instance. The only doubt is whether the Court will think that it makes any difference with respect to the defendant's right, that this being an issue on error in fact, the defendants are considered as actors, as in replevin, and could have taken the cause down to trial themselves; *Dennis* v. *Dennis* (*a*).

PATTESON, J.—I do not see that that deprives the defendants of their right to make the present motion. You may take your rule.

Rule absolute.

(*a*) 2 Saund. 335.

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REGINA *v.* The Justices of CHESHIRE.

A RULE nisi had been obtained, calling on the justices of the peace for the county of Chester to shew cause why a writ of certiorari should not issue, directed to them, to remove into this Court all and singular orders made by them at a general sessions of the peace, holden at Chester, in and for the said county, on the 20th day of December, 1844, upon an appeal by Thomas Fernyhough against an original order of two justices of the said county, under the hands and seals of the said justices; whereby the said Thomas Fernyhough was adjudged to be the putative father of a female bastard child, born of one Ann Hayes; together with the said original order, and all things touching the same.

The original order of the justices was as follows:—

County of Chester, } At a petty sessions, &c., holden, &c.,
To wit. } at, &c., on, &c., before us, the Reverend Thomas Brooke and Edward Hinchliffe, clerks, two of her Majesty's justices of the peace for the said county.

Whereas one Ann Hayes, single woman, residing at &c., did, on the 2nd day of November, in the year of our Lord, 1844, having been delivered of a female bastard child within twelve calendar months prior thereto, make application to the said Reverend Thomas Brooke, one of her Majesty's justices of the peace usually acting in this division, for a summons to be served upon one Thomas Fernyhough, of Madeley, in the county of Stafford, cooper, whom she alleged to be the father of the said child, and the said justice thereupon issued his summons to the said Thomas Fernyhough to appear at a petty sessions, to be holden on this day, for this division, to answer her complaint touching the premises; and whereas the said Thomas Fernyhough having been duly served with the said summons within forty days from this day, and being now present,

The 8 Vict. c. 10, enacts, that in orders of bastardy it shall be sufficient to follow the forms given in the schedule to the act. Form No. 8 in the Schedule has a blank left after the words and we having "heard the evidence of such woman:" *Held* on motion for a certiorari to bring up an order in bastardy, for the purpose of being quashed, as not shewing that the evidence of the woman was taken on oath, that it was not necessary that such blank should be filled up with the words "on oath," or "on affirmation."

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and the said Ann Hayes having now applied to us, the justices in petty sessions assembled, for an order upon the said Thomas Fernyhough, according to the form of the statute in such case made and provided; and it being now proved to us, in the presence and hearing of the said Thomas Fernyhough, that the said child was, on the 13th day of September, in the year of our Lord, 1844, that is to say, since the passing of an act passed in the eighth year of the reign of her present Majesty, entitled, "An Act for the further amendment of the laws relating to the poor in England," born a bastard of the said Ann Hayes; and we, having, in the presence and hearing of the said Thomas Fernyhough, heard the evidence of such woman, and such other evidence as she hath produced, and having also heard all the evidence tendered on behalf of the said Thomas Fernyhough, and the evidence of the said Ann Hayes, the mother of the said child, having been corroborated in some material particular, by other testimony, to our satisfaction, do hereby adjudge the said Thomas Fernyhough to be the putative father of the said child, and having regard to all the circumstances of the case, we do now hereby order, &c. (The order then directed the payment by the putative father of a weekly sum for the support of the child.) Given under our hands and seals at the session aforesaid.

THOMAS BROOKE, (L. S.)
EDWARD HINCHLIFFE, (L. S.)

The objection was, that it did not appear upon the face of the order that the evidence upon which the order proceeded was taken upon oath; and *Regina* v. *Wroth and Another* (*a*) was relied on as an authority for this objection.

Pashley shewed cause (*b*), and cited a variety of authorities to shew, that this being an order, and not a conviction, the same strictness of construction, as in cases of convictions,

(*a*) *Ante*, vol. 2, p. 729. (*b*) In Trinity Term.

was not required; and that even if it were, the word "evidence" was a vocabulum artis, and sufficiently described the testimony as taken on oath.

Townsend was heard in support of the rule.

[The argument on both sides is omitted, as no decision was come to on this point.]

Cur. adv. vult.

WIGHTMAN, J. (*a*)—Since this case was argued, my attention has been called to a recent act, the 8 Vict. c. 10, by the first section of which it is enacted, "that where any proceedings have been had or taken before the passing of this act, or shall hereafter be had or taken in matters of bastardy, under the provisions of the said recited act," (7 & 8 Vict. c. 101,) "and shall have been set forth according to the forms in the Schedule hereunto annexed, or to the like tenor or effect, the same shall be taken respectively to have been and to be valid and sufficient in law." The present order seems to be in the same form as that given in the Schedule to the act, (No. 8,) (*b*), and therefore any defect in it would seem to be cured.

(*a*) On the last day of Trinity Term.

(*b*) No. 8.

Form of Order when application was made by a Woman after birth.

To wit } At a petty session of her Majesty's justices of the peace for the *county* of holden in and for the *division* of in the said *county*, at on the day of in the year of our Lord one thousand eight hundred and forty before us her Majesty's justices of the peace for the said *county*.

Whereas one single woman, residing at within this *division* did, on the day of in the year of our Lord one thousand eight hundred and forty having been delivered of a bastard child *within* twelve calendar months prior thereto, make application to one of her Majesty's justices of the peace acting for this *division*, for a summons to be served

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Townsend. The form in the Schedule, No. 8, has a blank after the words, "heard the evidence of such woman," which, it is submitted, must clearly have been intended to be filled up with the words "on oath," or "on affirmation," as the fact might be. The words, "such woman," shew that the blank was not left for her name. The utmost

upon one of whom she alleged to be the father of the said child; and the said justice thereupon issued his summons to the said to appear at a petty session to be holden on this day for this *division* in which the said justice usually acts, to answer her complaint touching the premises:

And whereas the said having been duly served with the said summons within forty days from *this* day *and now appearing in pursuance thereof,* and the said having now applied to us the justices in petty session assembled, for an order upon the said according to the form of the statute in such case made and provided; and it being now proved to us, *in the presence and hearing of the said* that the said child was, *since* the passing of an act passed in the eighth year of the reign of her present Majesty, intituled, "An Act for the further Amendment of the Laws relating to the Poor in England," (that is to say) on the day of in the year of our Lord one thousand eight hundred and forty , born a bastard of the body of the said ; And we having, *in the presence and hearing of the said* heard the evidence of such woman and such other evidence as she hath produced, *and having also heard all the evidence tendered by the said* and the evidence of the said the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge the said to be the putative father of the said bastard child; and having regard to all the circumstances of this case, we do now hereby order that the said do pay unto the said the mother of the said bastard child, so long as she shall live, and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such bastard child under the provision of the said statute, the sum of *per week for the first six weeks from the birth of the said child, and from the expiration of such six weeks the sum of per week,* until the said child shall attain the age of thirteen years, or shall die, or the said shall marry: And we do hereby further order the said to pay to the said the sum of being the costs incurred in obtaining this order.

Given under our hands and seals, at the session aforesaid.

effect that this statute can have, is to obviate the objection, that "such other evidence as she hath produced" is not also stated to have been on oath. This is not a mere technical objection which the statute was intended to remove, but goes to the very substance of the order.

Pashley cited the case of *Regina* v. *Milner and Another* (*a*), where Mr. Justice *Coleridge* held, that the statute aided a mere technical objection to the wording of the order, although the precise words in the form given in the Schedule had not been used.

Cur. adv. vult.

WIGHTMAN, J., now delivered judgment.—This was an application for a certiorari to bring up an order in bastardy for the purpose of being quashed. The order was made under the 7 & 8 Vict. c. 101, and was defective, as it was alleged, on the face of it, for not stating that the evidence, in respect of which the adjudication proceeded, was given upon oath; and the case of *Regina* v. *Wroth and Another* (*b*) was relied on in support of this objection.

It has become, however, unnecessary for me to consider the points made, and authorities cited on either side in the course of the argument; because it appears, that a few days before the case was heard, the act of 8 Vict. c. 10, was passed, for the express purpose of removing certain questions which had been raised as to the validity of orders in bastardy under the 7 & 8 Vict. c. 101, and which questions were, as stated in the preamble of that act, "wholly beside the merits of the cases;" and it appears to me, that that act does remove the defects which have been objected to this order. It recites, that "divers questions have been raised as to the validity of certain orders in bastardy, made by justices under the act of the last session of Parliament, intituled 'An Act for the further amendment of the laws relating to the poor in England,'"

(*a*) *Ante*, p. 128.

(*b*) *Ante*, vol. 2, p. 729.

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and "that it is desirable to remove such questions, and to prevent the recurrence of the same, or similar questions, in future;" and enacts, "that where any proceedings have been had or taken before the passing of this act, or shall hereafter be had or taken, in matters of bastardy, under the provisions of the said recited act, and shall have been set forth according to the forms in the Schedule hereunto annexed, or to the like tenor or effect, the same shall be taken respectively to have been, and to be valid and sufficient in law."

It was argued that this statute, which has a retrospective as well as a prospective effect, applied to the order in question; and that, as it was according to the form contained in the Schedule, or, at least, to the like tenor and effect, the defect pointed out was aided by the statute; and I am of opinion that this is so.

It was contended, however, that the statute did not apply to the present case; because, in the form given in the Schedule to the act, there is a blank in setting out that part of it in which the evidence of the woman is stated. It reads thus:—"We having, in the presence and hearing of the said " (leaving a blank for the name of the man,) "heard the evidence of such woman;" and then there is a blank between these words and the following, "and such other evidence, &c.;" and this blank, it is contended, must be filled up by the words, "on oath," or "on affirmation," which are the only words, as it is argued, which could, by possibility, be there intended to be inserted.

I cannot, however, accede to this construction. What was meant by the Legislature, if anything, by leaving the blank, I know not; but I do not feel warranted in filling it up by the words "on oath," or "on affirmation."

It therefore appears to me, that as in the present case the form is in accordance with that given by the act of Parliament, the objection cannot be sustained, and that the present rule must, consequently, be discharged.

Rule discharged.

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REGINA *v.* The Justices of SURREY.

A RULE nisi had been obtained in Hilary Term last for a certiorari, directed to the justices of Surrey, to remove into this Court an order of quarter sessions, quashing an order of removal made under the hands and seals of two justices of the peace for the county of Surrey, whereby Charles Abbott and Esther, his wife, and their child, were ordered to be removed from the parish of St. Mary, Rotherhithe, in the said county of Surrey, to the parish of St. Pancras, in the county of Middlesex; for the purpose of being quashed, on the ground that the quarter sessions had not, under the circumstances, any jurisdiction to enter and respite the appeal.

It appeared, that the order of removal was made and served on the 27th of February, 1844, and that the actual removal of the paupers took place on the 27th of March following. That the first sessions after the removal were the Easter sessions, which were held on the 9th of April, and at which nothing was done. That at the succeeding sessions, the Midsummer sessions, which were held on the 2nd of July, and, by adjournment, on the 8th and 24th, the appeal was entered and respited ex parte, and without any notice to the respondents. That on the 28th of September, notice and grounds of appeal were sent to the respondents for the Michaelmas sessions, which were held on the 15th of October, at which sessions the appeal came on for hearing. That it was then objected on the part of the respondents, that the sessions had no jurisdiction, inasmuch as the appeal had been improperly entered and respited; but that the sessions overruled the objection, and, on hearing, quashed the order. That by the rules of the Surrey sessions, "six clear days' notice of appeal, and no more, is required to be given by the appellants to the

Where an order of removal was executed on the 27th of March, and the next Easter Sessions were held on the 9th of April, consequently less than fourteen days after the removal, and the appellants took no notice of those sessions, but entered and respited their appeal ex parte at the Midsummer sessions, and gave the regular notice, &c. for the Michaelmas sessions, at which sessions the appeal was entered and determined: *Held*, that the sessions had jurisdiction over the appeal to hear and determine it, and that the appellants were not bound to have entered and respited at the Easter sessions, or to have given notice of appeal for the Midsummer sessions.

The 9 Geo. 1, c. 7, s. 8, does not apply to the *first* sessions after the removal; but to the *first practicable* sessions.

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respondents previous to trying and prosecuting an appeal against an order of removal."

Howorth, (with whom was *Prendergast*,) shewed cause (*a*). It is true that by the rules of the sessions only "six clear days' notice of appeal" is necessary, and, therefore, that the appellants might have given notice for the Easter sessions, if it had not been for the statute 4 & 5 Wm. 4, c. 76, s. 81, which requires that the appellants shall deliver with the notice of appeal, "or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried," a statement of the grounds of appeal; and enacts, "that it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid." The Easter sessions, therefore, were not a practicable sessions at which the appeal could have been tried, and the appellants could not, consequently be required to give notice of appeal for those sessions; *Rex* v. *The Justices of Wilts* (*b*); *Rex* v. *The Justices of Kent* (*c*); *Rex* v. *The Justices of Buckinghamshire* (*d*); *Rex* v. *The Justices of Devon* (*e*). If there were no necessity to give notice of appeal for those sessions, there could be none to enter and respite the appeal at them. The Midsummer sessions then became the *next* sessions to which the parties were bound to appeal; and the appeal being once properly lodged, the sessions were fully authorized to adjourn the hearing till the next sessions; *Rex* v. *The Justices of Wilts* (*f*). It does not appear on the affidavit whether the appeal was respited on special grounds; but, at any rate, the sessions exercised their discretion on the matter, with which this Court will not interfere.

Montagu Smith and *Hawkins* in support of the rule.

(*a*) In Trinity Term.
(*b*) 8 B. & C. 380; S. C. 2 M. & R. 401.
(*c*) Id. 639; S. C. 3 M. & R. 15.
(*d*) 3 East, 342.
(*e*) 8 B. & C. 640, n.
(*f*) 13 East, 352.

The 13 & 14 Car. 2, c. 12, s. 2, and the 3 Wm. and M., c. 11, s. 10, require the parties aggrieved to appeal to the *next* quarter sessions. As the next quarter sessions sometimes happened to immediately follow the removal, the notice of appeal that could be given was, in particular cases, inconveniently short; and the 9 Geo. 1, c. 7, s. 8, therefore enacted, that no appeal should be proceeded with unless reasonable notice thereof were given to the respondents; but that the sessions at which such appeal was entered should adjourn the same to the next sessions, when the appeal should be finally heard and determined. It was supposed for some time that it was necessary, under this statute, to enter and respite the appeal at the first sessions, although a sufficient notice had not been given; but in the cases of *Rex* v. *The Justices of Devon* (*a*), and *Rex* v. *The Justices of Kent* (*b*), it was decided, that that was an useless form. The statute of 9 Geo. 1, c. 7, therefore, only applies to the next sessions after the removal, and that upon the express ground that they are not a sessions at which the parties, in fairness, should be compelled to try. But the present is an attempt to extend the powers given by this act to the second sessions after the removal, which the case of *Rex* v. *The Justices of Monmouthshire* (*c*) shews cannot be done. It is not meant to impeach the power of the sessions, independent of statute, to adjourn the hearing of an appeal at their discretion; but then the adjournment must take place when the parties have entered the appeal to try it, and not when it is entered as in the present case, ex parte, for the purpose of being respited. *Rex* v. *The Justices of the West Riding of Yorkshire* (*d*) is a case expressly in point. There an order of removal was executed on the 12th of January, and the Epiphany sessions were holden on the 18th, but the appellants did not appeal until the Easter sessions, when the justices refused to

(*a*) 8 B. & C. 640, n.
(*b*) Id. p. 639.
(*c*) 3 Dowl. 306.
(*d*) 4 M. & S. 327.

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receive it; and this Court declined to compel them to do so, as it appeared that the appellants were not in a condition to have entered and tried at those sessions, but only to have entered and respited. The purpose of the Legislature clearly is, that where a sufficient interval does not occur between the removal and the next sessions to give a reasonable notice of appeal, that then the appeal shall be heard at the second sessions; but in no case was it contemplated to give the power of putting off the appeal till the third sessions.

Cur. adv. vult.

In the present Term,

WIGHTMAN, J., delivered judgment.—In this case an order of removal was made in February, and the pauper was actually removed on the 27th of March. The next sessions were holden in the early part of April, but there was not sufficient time to give the requisite notices and grounds of appeal in order to try, and nothing was done by the appellants at those sessions. At the July sessions the appellants entered an appeal ex parte, and without any notice to the respondents. On the 28th of September, the appellants gave notice for the October sessions, and delivered grounds of appeal.

The appeal came on to be heard at those sessions, and it was objected by the respondents that the appellants were too late, and that the Court had no jurisdiction, and that the appellants ought to have given their notices, &c., in time for the July sessions, instead of merely entering and respiting the appeal ex parte. The objection was overruled by the Court, who heard the case and determined in favour of the appellants; and the question is, whether they had jurisdiction so to do? By the 13 & 14 Car. 2, c. 12, and 3 & 4 Wm. and M. c. 11, parties thinking themselves aggrieved may appeal to the *next* quarter sessions. The words of the statutes taken strictly would oblige the complaining parties to appeal to the very next sessions, however

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near they might be; but as reasonable time must be given to the appellant parish to determine whether they will appeal or not, and due notice, with grounds of appeal, must be given to the respondent parish, it might be impossible to appeal to the very next sessions consistently with those preliminary conditions; and it has, therefore, been determined, that the next sessions means the next practicable sessions, that is, the next sessions that are consistent in point of time with enabling the appellants to make due inquiries and give the requisite notices. In accordance with this construction of the statute, it is held to be unnecessary to take any step whatever at the sessions immediately succeeding the order appealed against. This, which was determined in *Rex* v. *The Justices of Essex* (*a*), and *Rex* v. *Thackwell* (*b*), and recognised in all the subsequent cases, may be considered settled law.

The appellants, then, in the present case, were not bound to take any notice of the April sessions whatever; but it is said, on the part of the respondents, that the appellants were bound to give their notices and serve their grounds of appeal, so as to enable them to try at the July sessions, and that it was not enough merely to enter and respite the appeal at those sessions.

When once it was settled that the first practicable sessions were the next sessions within the meaning of the statutes, it would seem to follow as a consequence that they must be so for all purposes; and if so, the statute of 9 Geo. 1, c. 7, s. 8, directing the justices to adjourn an appeal to the next quarter sessions where reasonable notice has not been given, would apply, and the justices be bound to adjourn the case; but whether it did or not, the justices would have jurisdiction where the appeal was entered, and might, of their own authority, adjourn the consideration of it; for which, if it were necessary to cite authorities, the cases of

(*a*) 1 B. & A. 210. (*b*) 4 B. & C. 62; S. C. 6 D. & R. 61.

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The King v. *The Justices of Wilts* (*a*), and *The King* v. *The Justices of Wilts* (*b*), are in point. If the justices had jurisdiction to adjourn the appeal, the question whether they properly exercised it, in adjourning the appeal ex parte, and when no notices had been served, would not be entertained by this Court, which will not review the decision of the Court of quarter sessions upon matters within their jurisdiction.

The adjournment then having been made from the July to the October sessions by a Court of competent jurisdiction, it appears to me that the order of the Court of quarter sessions in October cannot be impeached; and I may observe, that the judgment of Mr. Justice *Williams* in *Reg.* v. *The Justices of Suffolk* (*c*), is in accordance with the present decision, as is also that of Mr. Justice *Patteson* in *Rex* v. *The Justices of Monmouthshire* (*d*), as far as the facts of that case render it applicable to this. The rule must, consequently, be discharged.

Rule discharged.

(*a*) 13 East, 352.
(*b*) 8 B. & C. 380.
(*c*) 8 Dowl. 618.
(*d*) 3 Dowl. 306.

Ex parte CUNLIFFE.

When a party had given regular notices of his intention to apply to be admitted as an attorney on the first day of Hilary Term, and it appeared that on the second day of Michaelmas Term an offer of partnership from the London agents of the firm to which he was articled had been made, provided he could get admitted by the last day of that Term; the Court on motion, on the fourth day of Michaelmas Term, ordered that on his giving fresh notices referring to the former notices and the present rule, he should be examined, and if of ability, admitted the last day of that Term.

J. HENDERSON moved (*e*) that a gentleman of the name of Cunliffe should be examined by the Examiners in the course of the present Term, and be admitted on the last day of the Term, under the following circumstances.

(*e*) On the 5th of November.

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It appeared from the affidavits that Mr. Cunliffe had been duly articled, and had served under the articles, which service was complete on the 24th of June last. That on the 16th of October, he gave the usual notices of his intention to apply to be admitted in next Hilary Term. That on the 3rd of November, the town agents of the attorney to whom he had been articled had offered (he having served part of his time with them) to take him into partnership, provided he could be admitted as an attorney in this present Michaelmas Term. That it would be a serious loss and inconvenience to him, if in consequence of not having given notice till the next Term, he could not be admitted till then. Notice of the present motion had been given to the Secretary of the Incorporated Law Society.

J. Henderson submitted, that as the full Term's notice of intention to apply for admission as an attorney was not required by any statutory provision, but only by rule of Court; and as the Court had in several instances relaxed that rule in favour of parties, under special circumstances, it would consider the present as a proper case for a similar indulgence. He referred to *In re the Examiners of Attorneys* (*a*), and *Ex parte Twynam* (*b*). Here there can be no laches imputed to the applicant, as the circumstance creating the necessity of the application only arose on the first day of the present Term.

[Master *Bunce* stated that a similar case had occurred in Michaelmas Term, 1844, where an application under special circumstances having been made at Chambers in the preceding Vacation, to allow notices to be given for Michaelmas Term instead of Hilary Term, the Judge had allowed the notices to be given de bene esse, and directed an application to the Court in Michaelmas Term, where his decision had been confirmed.]

(*a*) 9 A. & E. 728.

(*b*) 8 Dowl. 293.

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Ex parte CUNLIFFE.

PATTESON, J.—I think there seem to be a precedent for granting this application. I am of course desirous of assisting this party, if I can do so without breaking through those rules which it has been thought necessary to lay down with respect to the admission of attorneys. Here the notices are properly given for Hilary Term, but he seeks to be admitted the last day of the present Term. I think, under the circumstances, that this may be done; but fresh notices should be given, referring to the former notices and the present rule.

Granted.

CHAPMAN *v.* BECKE.

The copy of a writ of summons served on the defendant was indorsed "The plaintiff claims 150*l.*, and interest for debt, and 3*l.* 3*s.* costs." *Held* irregular; and that the motion was correctly made to set aside the writ of summons as well as the copy and service thereof.

See 4 Dowl. 430. 6 — 722.

A RULE had been obtained, calling on the plaintiff to shew cause why the writ of summons herein, and copy and service thereof, should not be set aside, with costs, for irregularity. The copy of the writ of summons served on the defendant was indorsed, "The plaintiff claims 150*l.*, and interest, for debt, and 3*l.* 3*s.* costs." The ground of irregularity was, that it did not appear how much the plaintiff claimed for interest, and, therefore, that the Reg. Gen., Hilary Term, 2 Wm. 4, r. II., which is extended by Reg. Gen., Michaelmas Term, 3 Wm. 4, r. 5, to writs of summons, had not been complied with. That rule requires the amount of the debt and costs to be indorsed on every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, and directs, that upon payment thereof within four days, all further proceedings shall be stayed.

Archbold shewed cause. The object of the rule of Hilary Term, 2 Wm. 4, r. II., no doubt was, that the defendant might clearly know what sum was demanded of him, and, by payment of the amount, be discharged from the claim

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without incurring further expenses. But there is nothing said about "interest" in the rule. The words are, "that upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service and attendance to receive debt and costs; and that, upon payment thereof within four days to the plaintiff, or his attorney, further proceedings will be stayed:" and the form of the indorsement is required to be as follows: "The plaintiff claims for debt and for costs; and if the amount thereof be paid to the plaintiff, or his attorney, within four days from the service hereof, further proceedings will be stayed." By the subsequent rule of Michaelmas Term, 3 Wm. 4, r. 5, this regulation is extended to all writs of summons, distringas, capias, and detainer, and to the copy of every such writ. If this action be for a debt on which interest is payable, as, for instance, on a bill of exchange, the defendant must know from what time it is payable; and if the plaintiff were to indorse a sum certain, he might lose the interest on the four days within which the defendant may pay the amount and stay proceedings. [*Patteson*, J.—Why could not the plaintiff state that he claims interest from a certain day?] The Court will not construe indorsements of this kind strictly. If it be wrong, the defendant should have applied to have had the writ and copy amended. If it be necessary to state the time from which the interest is claimed, then it may be taken to be claimed from the day the writ issued; *Pierce* v. *Fothergill* (*a*). It is clear the *amount* of the interest claimed need not be stated; *Coppelo* v. *Brown* (*b*), *Sealy* v. *Hearne* (*c*). The motion is informal, for it asks to set aside both the writ and the copy, and it does not appear that the writ also is irregular.

(*a*) 2 Bing. N. C. 167; S. C. 2 Scott, 334.
(*b*) 1 Cr., M. & R. 575; S. C. 3 Dowl. 166.
(*c*) 3 Dowl. 196.

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Lush, in support of the rule. The plaintiff is bound to shew, by his indorsement on the writ, what sum he claims to be due from the defendant. The argument that the defendant, who is willing to pay the debt, must know how much the interest amounts to, would equally apply to the omission to indorse the amount of the debt itself. It might be a question, even if it stated that interest was claimed from a day certain, whether that would be sufficient, as the defendant could not tell what rate of interest was claimed. But here, even that has not been done. In *Fitzgerald* v. *Evans* (*a*), where the application was to allow a distringas to compel an appearance to issue, where the indorsement was the same as in the present case, it seems to have been admitted on the argument, and conceded by the Court, that the indorsement was irregular. The case of *Ryley* v. *Boissomas* (*b*) shews, that the rule requiring the indorsement is imperative. The defendant has a right to presume that the copy is a true copy, and if so, the motion is correct in seeking to set aside the writ itself; *Anon.* (*c*). He referred also to *Chalkley* v. *Carter* (*d*), and *Argent* v. *Reynolds* (*e*).

PATTESON, J.—It appears to me that the rule of Court is very clear. Its object is, to shew the defendant in express terms what the plaintiff is contented to take, in order that the former may tender it, together with the costs, within the four days; and therefore it is that such a notice is obliged to be indorsed on the writ. The plaintiff, consequently, ought to have stated what sum he claimed for interest, or from what time he claimed it. It is possible to conceive cases where the defendant could not find out from what time the interest was intended to be claimed. It may be that the plaintiff is not obliged to state the precise amount of interest, and that according to the cases, it

(*a*) 5 M. & G. 207; S. C. 6 Scott. N. R. 220; 2 Dowl. 916, N. S.
(*b*) 1 Dowl. 383.
(*c*) 1 Dowl. 654; S. C. *nom.* *Hasker* v. *Jarman*, 1 C. & M. 408.
(*d*) 4 Dowl. 480.
(*e*) 6 Dowl. 480.

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would be sufficient to say that interest at such a rate is claimed from a certain day. Without, however, going into that question, I think that the rule was framed for the purpose of giving specific information, which has not been afforded in the present case. The case of *Fitzgerald* v. *Evans* is not a direct authority upon the point; but my Lord Chief Justice, and my Brother *Maule*, seem both to have considered that the writ there might have been set aside for irregularity for a similar defect to that which exists in the present case.

With respect to the form of the motion, I think that it is correct, and that in the absence of any proof to the contrary, the defendant has a right to assume that the copy served is a true copy of the writ, and that the writ is defective as well as the copy. The rule will, therefore, be absolute.

Rule absolute.

HARRISON *v.* GREENWOOD.

On the trial of a cause before the sheriff, under a writ of trial, a verdict was taken by consent of the parties, subject to a reference. Owing to the absence of the referee from town, the reference could not be gone into. The plaintiff accordingly gave notice that he abandoned the former verdict, and that he should proceed to try the cause de novo; which he accordingly did in the defendant's absence, and obtained a verdict: *Held*, that the second verdict was irregular, and must be set aside; and that the first ought not to stand, as it was subject to a reference, which had proved abortive, and which the sheriff had no power to order.

A WRIT of trial in the above cause, which was an action of debt, was directed to the sheriff of Middlesex. Upon the cause coming on to be tried on the 22nd of July, 1845, a verdict was taken for the plaintiff by consent for the amount claimed, "subject to a reference, the costs to abide the award" (*a*).

It appeared that owing to the absence of the referee from

(*a*) This was the entry on the sheriff's notes. The briefs were endorsed "verdict 4*l.* 5*s.* 9*d.*, cause and all matters in difference between the parties subject to certificate of arbitrator, costs to abide the event."

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town, nothing could be done in the matter of the reference. An application was made on the 28th of July to Mr. Justice *Wightman* at Chambers to have another arbitrator appointed; but that learned Judge refused to interfere, thinking he had no power to do so; and told the parties they must either wait for the return of the arbitrator to town, or enter the cause again and try it afresh. The plaintiff accordingly on the 30th of July gave a fresh notice of trial for the 7th of August. And the plaintiff's attorney at the same time wrote a letter to the defendant stating that he considered the reference as at an end, and that he should proceed to trial de novo. The defendant disregarded this notice; and the plaintiff proceeded to trial on the day named, in the defendant's absence, and obtained a verdict for 4*l.* 5*s.* 9*d.*

A rule had been obtained, calling on the plaintiff to shew cause why the last verdict, and all proceedings taken since the 22nd of July should not be set aside with costs for irregularity; and as being in violation of the agreement to refer the cause and all matters in difference.

Butt shewed cause. The case of *Wilson* v. *Thorpe* (*a*), shews that in the case of a writ of trial, the sheriff is bound to try the cause, and has no power to delegate his authority; and that if a verdict in pursuance of the award of an arbitrator be entered up, it may be set aside. The first verdict therefore might be treated as a nullity, and the trial having become abortive, the plaintiff was entitled to give a fresh notice and to proceed to an effectual trial of the cause. [*Patteson*, J.—The case cited does not go the full length of your argument. It only shews that the verdict taken before the sheriff cannot be altered by any other party. You wish to go further, and to say that if a verdict be taken subject to a reference, it is a nullity]. It is difficult to see what return the sheriff could make to the writ of trial.

(*a*) 6 M. & W. 721.

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Rew, in support of the rule. The plaintiff must shew that the first verdict was a nullity; for he has treated it as such. The case of *Wilson* v. *Thorpe* does not go that length; and if it does, it is submitted that it requires reconsideration. There seems no reason why if the parties themselves consent, the sheriff should not have the power to order a reference. There would be no more difficulty in making a proper return to the writ of trial, than there is in making up the record at Nisi Prius, where the verdict is taken by consent subject to a reference. This is not the case of a sheriff acting beyond his jurisdiction. It has been decided that where the sheriff summons a wrong jury, and the party is cognizant of that fact, he cannot after verdict object on that ground; *Pryme* v. *Titchmarsh* (*a*). That is even a stronger case than the present; for there the sheriff is acting beyond the authority given him by the writ of trial. Taking this case in the most unfavourable point of view for the defendant, and assuming it to amount to miscarriage or misconduct on the part of the jury, it was not competent to the plaintiff of his own authority to treat the verdict as a nullity. He should have to come to this Court to ask to set it aside. Here the jury were summoned and even a witness called, as appears by the sheriff's notes. The case of *Wilson* v. *Thorpe* is itself an authority that the party must come to the Court to set the verdict aside. [He also contended that the writ of trial being spent when the first verdict was obtained, the plaintiff could not alter and reseal the writ; and that there was a variance between it and the issue delivered. He referred to *Dennett* v. *Hardy* (*b*), and *Lycett* v. *Tennant* (*c*), but the argument is omitted, as no judgment was given on the point.]

Cur. adv. vult.

PATTESON, J.—It is quite clear on looking at the autho-

(*a*) 10 M. & W. 605; S. C. 2 Dowl. 474, N. S.

(*b*) *Ante*, vol. 2, p. 484.

(*c*) 4 Bing. N. C. 168; S. C. nom. *Blissett* v. *Tenant*, 5 Scott, 479; 6 Dowl. 436.

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rities that the verdict which was taken in the first instance, is not a nullity. There was a proper writ of trial, the jury were properly summoned and sworn, and a verdict taken. It is true that the verdict taken was subject to a reference; and that, according to the decision which has been cited of the Court of Exchequer (*a*), a sheriff has no power to order a reference. There the parties had consented to a verdict being taken subject to a reference to a third party who was to have power to alter the verdict, which he did; and the Court set aside the verdict and judgment. But in that case there was an award, and the Court did not order the award to be set aside. Here, however, there is, it seems, no award. There no doubt was some mistake as to what fell from my Brother *Wightman*, when the parties went before him at Chambers. In saying that the proper course would be to try the action again, he was taken to mean that it might be set down again for trial simply; but no doubt all that he intended was, that the plaintiff must get rid of the first trial and verdict in a regular manner, and then try it again.

The latter verdict must therefore be set aside as irregular, but the first verdict ought not to stand as it was taken subject to a reference. The rule will therefore be absolute, on condition, that unless some arrangement can be come to, both verdicts be set aside.

I see no objection on a writ of trial to the parties having a Judge's order to refer. All that the Court of Exchequer, in the case referred to, decide, is that the sheriff has no authority of himself to refer the cause.

Rule absolute accordingly.

(*a*) *Wilson* v. *Thorpe*, 6 M. & W. 721.

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WILLIAMS *v.* WELCH and Another.

On motion to make a rule absolute, an affidavit of service sworn before a British consul abroad is insufficient; although it appear that according to the law of the foreign country, an affidavit cannot be taken by any of the authorities there.

A RULE nisi had been obtained for a scire facias to revive a judgment against the defendants, at the suit of the personal representative of the plaintiff, who was dead. The affidavit of service of the rule on the defendant Welch, who was residing at Paris, was sworn before the British consul at Paris, whose handwriting was verified by an affidavit of an individual in the Secretary of State's Office. It was also shewn upon affidavit, that by the law of France, there was no judicial or ministerial officer before whom an oath could be taken.

Swann moved to make the rule absolute on the above affidavit of service. It is submitted that, under the circumstances, the affidavit is well sworn. It is true that in the case of *Le Veux* v. *Berkeley* (*a*), this Court refused to admit an affidavit in support of a motion for a new trial, where the affidavit had been sworn before the British consul resident at Paris; but there it did not appear but that the affidavit could have been sworn before a foreign magistrate. In *Davy and Others to Maltwood* (*b*), which was a motion to enrol an acknowledgment of a married woman under the 3 & 4 Wm. 4, c. 74, s. 85, where that fact did appear, the Court of Common Pleas held the affidavit sufficient. So in the case of *In re Pickersgill* (*c*), where the Court acted on the former case of *Davy and Others to Maltwood*, and decided to the same effect. In a recent case in the Court of Chancery, *In re Dyce Sombre* (*d*), affidavits sworn before an English consul abroad were admitted without objection. [*Patteson*, J.—I see in a note to *Chitty and*

(*a*) *Ante*, vol. 2, p. 31; S. C. 5 Q. B. 836.
(*b*) 2 M. & G. 424.
(*c*) 6 M. & G. 250; S. C. 6 Scott. N. R. 831.
(*d*) Not reported.

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Hulme's edition of the Statutes, 3 & 4 Wm. 4, c. 74, s. 85, p. 429, n. (*e*), it is said, "a British consul has power under the 6 Geo. 4, c. 87, s. 20,—to certify as to the handwriting and authority of the party before whom the above affidavit is sworn, when the acknowledgment is made by a married woman abroad:—though," it is added, "not to take the affidavit itself;" and for this, *Ex parte Hutchinson* (*a*) is cited. In that case, and the subsequent one of *Le Veux* v. *Berkeley* (*b*), we proceeded on the ground that the authority which a consul had to take affidavits abroad, was only in those cases where a justice of the peace could take them at home. The case of *Ex parte Hutchinson* is precisely in point: that of *Le Veux* v. *Berkeley* is perhaps not quite so strong, as the opposite party consented to withdraw the objection. How could you indict for perjury on this affidavit?] The decision in *Le Veux* v. *Berkeley* is rested on the previous decision in *Ex parte Hutchinson* of the Court of Common Pleas. The authority of that case is, therefore, much shaken by the more recent decisions of the Court of Common Pleas the other way. The Court will look at the hardship which would result from holding an affidavit like the present inadmissible where parties are residing abroad, and they have no means otherwise of making an affidavit.

Cur. adv. vult.

PATTESON, J.—In this case the question was, whether an affidavit of service of a rule sworn before a British consul abroad was sufficient. The case of *Le Veux* v. *Berkeley*, in this Court, was referred to as being against its sufficiency; but that case, it was said, was only founded on the previous decision of the Court of Common Pleas in *Ex parte Hutchinson*, and that the Court of Common

(*a*) 4 Bing. 606; S. C. 1 M. & P. 559.

(*b*) *Ante*, vol. 2, p. 31; S. C. 5 Q. B. 836.

Pleas had since permitted, in several cases, such affidavits to be used; in the last of which, *In re Pickersgill* (*a*), an affidavit verifying the certificate of an acknowledgment of a married woman, taken by the minister at the British chapel at Moscow, the magistrates in Russia having no authority to administer oaths, was held sufficient. I have spoken to the Lord Chief Justice of the Common Pleas upon the subject, and he thinks that the Court, in deciding the cases referred to, intended to confine the rule there acted upon to cases of acknowledgments taken under the act, (3 & 4 Wm. 4, c. 74, s. 79,) and not generally to all affidavits. Therefore as the case of *Le Veux* v. *Berkeley* is expressly in point, I must refuse to receive this affidavit; and the motion cannot, consequently, be granted.

Motion refused.

(*a*) 6 M. & G. 250.

REGINA *v.* THOMAS BAILEY ROSE and PHILIP B. BROADE, Esqrs.

An order in bastardy omitted to state on the face of it that the application for it had been made within forty days from the service of the summons upon the putative father (7 & 8 Vict. c. 101, s. 4:) *Held* bad, as not shewing jurisdiction on the part of the justices making it.

A notice to justices under the 13 Geo. 2, c. 18, s. 5, of an intention to move for a certiorari "in six days from the giving of this notice, or as soon after as counsel can be heard," is sufficient.

A RULE nisi had been obtained, calling upon Thomas Bailey Rose, Esq. and Philip B. Broade, Esq., two of her Majesty's justices of the peace in and for the county of Stafford, to shew cause why a writ of certiorari should not issue, commanding them to return into this Court an order, dated the 10th of May, 1845, under their hands and seals, and purporting to be made "at a petty session of her Majesty's justices of the peace for the county of Stafford, holden in and for the borough of Stoke upon Trent, and certain places adjoining in the county of Stafford, held at

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the police court, Stoke upon Trent, in the said county;" whereby they did adjudge Thomas Pratt, of Fenton, in the said county, to be the putative father of a bastard child, and adjudged him to pay a certain weekly sum for maintenance. The order recited the complaint to have been made on the 22nd of March last; but did not shew on the face of it, that it was applied for within forty days after the service of the summons on the putative father. The notice to the justices of the present motion was of an intention to move "in six days from the giving of this notice, or as soon after as counsel can be heard."

The objection to this order was, that it did not shew on the face of it that the application for it was made to the said T. B. Rose and P. B. Broade, Esqrs., within the space of forty days from the service of the summons upon the said Thomas Pratt to answer the said charge, as required by law (*a*).

[It was also objected that the justices had no jurisdiction, as they were not acting at the time at a petty sessions for a petty sessional division of the county of Stafford; Mr. Rose being only justice of peace within the borough of Stoke upon Trent, and certain parts adjoining, by virtue of the act of Parliament, 2 Vict. c. 15; and part of the hundred of Pirehill (in which the police court, Stoke upon Trent, is situate), being out of his jurisdiction; but as no judgment was given on this point, the argument on both sides is omitted.]

E. Yardley shewed cause. There is a preliminary objection to this motion. The 13 Geo. 2, c. 18, sec. 5, enacts, that no writ of certiorari shall issue, unless it be duly proved that the party or parties suing forth the same "hath or have given six days' notice thereof in writing to the justice or justices," &c. Six days mean six clear days;

(*a*) It appeared upon affidavit that the application was, in point of fact, made within forty days of the service of the summons.

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whereas the notice that is here given is of an intention to move "in six days," which would be complied with if the motion were made on the sixth day. The objection urged against the order is, that it does not shew on the face of it that the application for it was made within forty days from the service of the summons on the putative father. This objection arises under the 7 & 8 Vict. c. 101, sec. 4, which enacts, "that no such order shall be made unless applied for at such petty sessions within the space of forty days from the service of the summons—on the person alleged to be the father of such bastard child." We shew, upon affidavit, that in point of fact the application was made within the specified time; and it is submitted that it is not necessary that it should appear on the face of the order. It is true that in the form given in the schedule to the recent act, 8 Vict. c. 10, sched. No. 8, there is an allegation that the party has been served within forty days from the date of the order; but those forms are directory only. In *Nolan on the Poor Laws*, vol. 2, p. 299, *4th ed.*, and in *Paley on Convictions*, pp. 128, 129, *3rd ed.*, it is laid down that in strictness it is not necessary that it should appear on the face of orders of this description that the party has been summoned; for the Court will intend he was, unless the contrary appear. In the case of *The King* v. *Venables* (*a*), which was an order to suppress an alehouse, it was held, that although a summons must appear on a conviction, it need not on an order of that description. And in the case of *The King* v. *Clayton* (*b*), it was held, that every reasonable intendment should be made in favour of an order in bastardy.

F. V. Lee, in support of the rule. With respect to the objection to the notice, "*in* six days" does not necessarily mean "*within* six days." Taken in conjunction with the words "or as soon after as counsel can be heard," it

(*a*) 8 Mod. 377.

(*b*) 3 East, 58.

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evidently means *at the expiration* of six days. At any rate, it is a sufficient compliance with the terms of the statute, which requires "six days' notice" of the intention to move. The objection to the order, it is submitted, has not been answered. It is conceded that it does not appear on the face of the order, that the application on which it proceeds was made within forty days from the service of the summons; and it is submitted that that was necessary in order to give the justices jurisdiction. If that be so, then whatever difference of construction it may be said prevails with respect to orders as distinguished from convictions, it must be taken as settled law that justices must shew on the face of their orders that they have jurisdiction to make them. The form given in the schedule to the 8 Vict. c. 10, No. 8, is a strong corroboration of the validity of the present objection. That act was expressly passed, as may be found from the recital, to aid defects in orders which were rather of form than of substance; and it only cures defects which follow the form given in the schedule, or which are "to the like tenor and effect." When reference is made to the form given in the schedule for an order like the present (sched. No. 8), it will be found that there is an express statement that the putative father has been duly served with the summons within forty days from the date of the order. It cannot be contended that in the present case there is any statement to the like tenor and effect.

[*E. Yardley* referred to *In re Flounders* (*a*), as shewing that the notice given was insufficient. There the notice was of an intention to move "on the first day of next Hilary Term, or so soon after as I can be heard;" and the Court held this notice to be irregular.]

PATTESON, J.—In the case of *In re Flounders*, the notice was served on the first day of Hilary Term, the very day

(*a*) 4 B. & Ad. 865; S. C. 1 N. & M. 592.

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on which the motion was to be made; and the notice was bad on the face of it, as it clearly treated the six days' notice as unnecessary. Here the notice is good on the face of it, for it is a notice that "in six days, or as soon after as counsel can be heard," the motion will be made; and I think that must be taken to mean after the six days have expired.

With respect to the other point, without entering into the objection about the petty sessional division, which might involve the construction of the act of Parliament under which Mr. Rose is appointed, it seems to me that the omission to state that the order was applied for within forty days from the service of the summons on the putative father is fatal; for it is quite clear that the justices had no jurisdiction unless the application was made within that period; and therefore it ought to have appeared on the face of the order that it was made within the limited time. The statute, 8 Vict. c. 10, has been referred to, which was passed to remedy defects in orders which were "wholly beside the merits of the cases." That statute declares that all orders which shall be set forth according to the forms given in the schedule to this act, "or to the like tenor or effect," shall be valid and sufficient in law. Now, on reference to the form given in the schedule of such an order as the present, there will be found to be a statement that the order is made within forty days from the service of the summons. It would seem, therefore, that the Legislature thought that this should appear on the face of the order; and it is clear that as it does not appear on the present order, the provisions of that statute cannot be called in aid to cure the defect. It has been urged, however, that there is a distinction between orders and convictions; and Mr. Paley has been cited as an authority that a bastardy order is not to be treated as a conviction, or construed so strictly. The inclination of this Court, however, of late has been to treat orders of a final nature, like the present, more as convictions than as orders. I do not mean to say that an order in

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bastardy is to be considered for all purposes as a conviction; but I do not quite see how an order fixing a party as the putative father of a bastard, and compelling him to pay the costs of its maintenance, differs materially from a conviction. I should have hesitated about granting this motion, if this had not been an objection to the jurisdiction of the magistrates; but as it is, I think the objection must prevail, and that the rule for a certiorari must be made absolute.

Rule absolute.

JUBB *v.* ELLIS.

To a declaration in debt for goods sold and delivered, and on an account stated, the defendant pleaded, that by a certain indenture bearing date, &c. (profert) the plaintiff released to the defendant the debts and causes of action in the declaration mentioned. The plaintiff replied non est factum, on which issue was joined: *Held*, that the plaintiff under this replication could not give in evidence that the debt for which the action was brought was not included in the release; but should have new assigned.

DECLARATION in debt for goods sold and delivered, and for money due on an account stated.

First plea, the general issue. Second plea, that after the accruing of the said debts in the declaration mentioned, and before the commencement of the suit, to wit, on the 17th of January, A. D., 1845, the plaintiff, by a certain indenture in writing, sealed with the seal, &c. (profert), released to the defendant the said debts and causes of action in the declaration mentioned.

The plaintiff replied, taking issue on the first plea, and replied to the second, non est factum, on which issue was joined.

At the trial which took place before the Secondary of London, it appeared that the action was brought to recover the sum of 9*l.* 14*s.* 6*d.*, for goods furnished by the plaintiff to the defendant. The defendant had become unable to meet his engagements, and had been obliged to compound with his creditors, amongst whom was the plaintiff. His creditors had consented to accept a composition of six shillings in the pound in full of all their demands, and the plaintiff, amongst the rest, executed the deed of release mentioned

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in the plea. The plaintiff's claim against the defendant had amounted to 152*l.* 16*s.*, including the above sum of 9*l.* 14*s.* 6*d.*; and he sought to shew at the trial, that this sum of 9*l.* 14*s.* 6*d.* had been excepted from the release, in consequence of an arrangement to return the goods to that amount, which had not been complied with; and that the defendant had subsequently promised to pay that sum. It was objected, that it was not competent to the plaintiff, on the above pleadings, to shew that he was proceeding for a claim not included in the release; but that he ought to have new assigned, in order to enable him to do so. The cases of *Rogers* v. *Custance* (*a*), and *Simons* v. *Johnson* (*b*), were referred to; and the Secondary, holding the objection to be a valid one, nonsuited the plaintiff, reserving leave to move to set the nonsuit aside.

H. S. Wilde, now moved for a rule, calling on the defendant to shew cause why the nonsuit should not be set aside, and a new trial had between the parties. He submitted that the evidence offered at the trial to shew that the debt for which the action was brought was not included in the deed of release, was admissible. The plaintiff being a party to the deed, could only reply non est factum, and could not reply that he did not release. It is laid down in *Stephen on Pleading,* pp. 221, 2, *4th edition,* "that a party to a deed who traverses it, must plead non est factum, and should not plead that he did not grant, did not demise," &c., and for this, the following authorities are cited; *Doct. Pl.* 261; *Robinson* v. *Corbett* (*c*); *Taylor* v. *Needham* (*d*). And the reason for this rule rests on the doctrine of estoppel, which will not permit a man to contradict his own deed; although he may say, that the deed is not his. The new rules of pleading, Reg. Gen., Hilary Term, 4 Wm. 4, do not apply to replications, and therefore whatever might have

(*a*) 1 Q. B. 77; S. C. 4 P. & D. 574.
(*b*) 3 B. & Ad. 175.
(*c*) Lutw. 656.
(*d*) 2 Taunt. 278.

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been given in evidence under the plea of non est factum, before those rules were framed, may still be given in evidence under the replication of non est factum. A new assignment is only required to set the defendant right. The case of *Simons* v. *Johnson* (*a*), is in point. There the defendant pleaded a release, which recited several actions against him at the suit of the plaintiff; and it was held, that the plaintiff might shew that at the time of executing the release, there were mutual actions depending between the plaintiff and the defendant, for other causes than that of the then suit, and that the release was given for such causes only. In *Rogers* v. *Custance* (*b*), the plea was particular, and limited the declaration, which was general; but here the plea is equally general with the declaration, and, therefore, the plaintiff is entitled to apply his replication to the plea, so far as it touches the claim as proved under the declaration. The case of *Moses* v. *Levy* (*c*), is also in point. There, in an action on a guarantee, to which the defendant pleaded a general plea of payment in satisfaction and discharge, which the plaintiff traversed; it was held, that the plea being as general as the declaration, the defendant was bound to shew payment of all the goods which the plaintiff could prove were furnished under the guarantee, and that the plaintiff was not bound to new assign.

PATTESON, J.—The difficulty seems to be, how it can be said, as the declaration is general, that there is any other issue raised than the execution of the deed? If the plea were generally, that the plaintiff released the defendant, it might be different. Here, however, the defendant sets out a particular deed, which he brings into Court, and by which he alleges that the plaintiff released him, and the replication must merely mean, that the plaintiff did not execute that particular deed.

Cur. adv. vult.

(*a*) 3 B. & Ad. 175.
(*b*) 1 Q. B. 77.
(*c*) 4 Q. B. 213; S. C. 3 G. & D. 536.

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On a subsequent day,

PATTESON, J., (after shortly stating the pleadings).—The declaration was quite general, and in the usual form; and the plaintiff was therefore entitled to give in evidence under it the sale and delivery of any goods at any time; and there is no restriction, but what is introduced by the particulars of demand; and we have often said, that the particulars of demand cannot, for the purposes of pleading, be taken to be incorporated in the declaration. The plea in question is, that by a certain deed, of which profert is made, the plaintiff released the defendant; to which the plaintiff has replied, non est factum. Under that replication, it was contended at the trial, that the plaintiff was entitled to shew that the debt for which the action was brought was not included in the release. The Secondary thought that this evidence could not be received, and, accordingly, nonsuited the plaintiff, which nonsuit it is now sought to set aside. I am of opinion that it was necessary for the plaintiff to new assign, in order to let in that answer to the plea. Where the declaration is particular, as if it were on a bill of exchange of a certain date and for a certain amount, and the defendant plead a release, it would, I think, be competent to the plaintiff, under a replication of non est factum, to shew that the release did not extend to the cause of action declared on; that it did not in the instance referred to, apply to the particular bill of exchange therein mentioned. But here the case is different, for the release would primâ facie apply to whatever is the subject matter of the declaration, inasmuch as the latter is perfectly general. It seems to me, therefore, that the answer here attempted to be set up, was properly matter for a new assignment. I have no doubt upon the point, and, therefore, there will be no rule.

Rule refused.

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LADBROKE and Others *v.* WILLIAMS.

After issue joined, and notice of trial given in a town cause for the sittings after Easter Term, it was made a remanet to the sittings after Trinity Term. The plaintiffs then made default: *Held*, that the defendant was entitled to move for judgment as in case of a nonsuit.

A RULE nisi had been obtained in this cause, which was a town cause, for judgment as in case of a nonsuit. Issue was joined on the 23rd of April, 1845, and notice of trial was given for the sittings after Easter Term. At those sittings it was made a remanet to the sittings after Trinity Term, when it was, owing to the default of the plaintiffs, struck out of the list of causes.

Gunning shewed cause, and contended that the defendant was not entitled to the present motion, inasmuch as the plaintiffs having once taken down the cause for trial, the defendant's remedy was to take the cause down and proceed to trial by proviso. He referred to *King* v. *Pippett* (*a*), *Brown* v. *Rudd* (*b*).

Roope, contrà.

PATTESON, J.—In *Ham* v. *Greg* (*c*), where a town cause was made a remanet from the sittings after one Term to the sittings after another, when the plaintiff made default, the Court held that the defendant was entitled to judgment as in case of nonsuit. That case is precisely in point. The plaintiffs must give a peremptory undertaking.

Rule accordingly (*d*).

(*a*) 1 T. R. 492.
(*b*) 1 Dowl. 371.
(*c*) 6 B. & C. 125; S. C. 9 D. & R. 125.
(*d*) See *M'Intyre* v. *Sewers*, *ante*, vol. 2, p. 896; S. C. *dis. nom.* 14 M. & W. 102.

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COLE *v.* GANE.

CARROW moved to change the venue in this case from Middlesex to the city of Bristol, on the common affidavit. He stated that there had been some difficulty felt in granting these motions in Michaelmas and Hilary Terms, on account of there being no assizes held at Bristol in the Spring; and as Bristol, with some other cities, was excepted by the 10th section of the 38 Geo. 3, c. 52, from the operation of the 1st section, which empowers the Court, in the case of actions in which the venue is laid in a city, to enter a suggestion on the record that the cause shall be tried in the adjoining county, the plaintiff in such cases would consequently be delayed in his action till the Summer Assizes. That difficulty, he submitted, however no longer existed; for by the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 109 (*a*), which recites the 38 Geo. 3,

The 5 & 6 Wm. 4, c. 76, s. 109, places the cities therein named in the same position as if they had not been excluded by the 38 Geo. 3, c. 52, s. 10, from the operation of the 1st section of that act.

(*a*) Sect. 109. "And whereas an act was passed in the thirty-eighth year of his late Majesty George the Third, intituled, 'An Act to regulate the trial of Causes, Indictments, and other proceedings which arise within the counties of certain cities and towns corporate within this kingdom,' but certain cities and counties of cities were excepted out of the operation of the same: And whereas it is expedient to repeal in part the said exceptions; be it therefore enacted, that so much of the last recited act as provides that nothing therein contained shall extend or be construed to extend to the city or county of the city of Bristol, or the city or county of the city of Chester, or to the criminal jurisdiction of the city of Exeter and county of the same city, shall be and the same is hereby repealed; and that the town of Berwick upon Tweed shall be taken to be a county of a town corporate, and to be within all the provisions of the last recited act; and that after the first day of May in the year 1836, and until his Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within any county of a city or town corporate, all bills of indictment for offences committed within such county of a city or town corporate shall be preferred and all proceedings upon such indictments shall be had as in the last recited act is authorized to be done, and the counties of the cities and towns

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c. 52, it is enacted, that so much of the said recited act as excepts Bristol from the provisions thereof be repealed. [*Patteson*, J.—That appears to relate to criminal proceedings, as the section continues thus, "until his Majesty shall be pleased to direct a commission of oyer and terminer, and gaol delivery," &c.] The recital gives the title of the former act as "An Act to regulate the trial of *Causes*, Indictments," &c. The city of Bristol therefore stands, it is submitted, in the same position as any other city, not excepted from the operation of the 38 Geo. 3, c. 52, s. 1. He cited *Bird* v. *Morse* (*a*).

PATTESON, J.—It seems that Bristol is now put in the same condition as other cities which were not excepted by the 10th section of that act.

Motion granted.

corporate named in the first column of the schedule (C) to this act annexed shall be considered as next adjoining to the county named in conjunction with the same respectively in the second column of the said schedule (C)."

(*a*) 7 Taunt. 385.

BORDIER *v.* BARNETT and Others.

Issue was joined on the 3rd of June, 1844, and notice of trial given for the adjourned sittings after Trinity Term, 1844, which was afterwards postponed by consent to the sittings after Michaelmas Term in the same year. The record was at those sittings withdrawn on the ground of the absence of some material witnesses on the part of the plaintiff. In Trinity Term, 1845, the plaintiff obtained commissions to examine his witnesses abroad, and in July in the same year, the defendants also obtained a Judge's order for a commission to issue to examine witnesses on their behalf, which order contained the usual proviso, that the trial of the cause should not be proceeded with till the return of the commission. The defendants did not issue any commission: *Held*, that they had waived any right they might have had to move for judgment as in case of a nonsuit.

THIS was a motion for judgment as in case of a nonsuit. The cause was a town cause, and issue had been joined on the 3rd of June, 1844, and on the same day notice of trial was given for the adjourned sittings after the then Trinity Term.

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In answer to this motion, the affidavit of the plaintiff's attorney shewed that the cause was made a remanet by consent to the sittings after Michaelmas Term 1844, when the cause was not tried, on account of the absence of certain material witnesses, who resided abroad. That a rule was granted for a commission to examine these witnesses on the part of the plaintiff, in Trinity Term, and also a Judge's order in the same Term, on the 4th of July, in which was contained the usual proviso, that the trial of the cause should be postponed till the return of the commissioners; and that a commission issued to Calais, and was executed in the presence of the defendants' commissioners and agents, and was returned on the 17th of October last; and that another commission also issued to Paris, and was not yet returned, owing to a delay which had occurred in examining the witnesses under the other commission. That on the 4th of July, 1845, two Judge's orders, to which the plaintiff had consented, had been obtained by the defendants, authorizing them to issue one commission to examine witnesses at Paris, and another to examine witnesses at Calais; with a proviso that the trial of the cause be postponed until the return of the first commission; but that the defendants had taken no further steps to issue these commissions.

Bovill shewed cause. The case of *Gardner* v. *Moses* (*a*) shews that the absence of material witnesses, and their return not being immediately expected, is a sufficient excuse for the plaintiff's not proceeding to trial; and that therefore he is entitled to discharge a rule for judgment as in case of a nonsuit, without a peremptory undertaking. The defendants never were entitled in the present case to a peremptory undertaking, as the plaintiff's affidavit shews that the record was only withdrawn on account of the absence of necessary and material witnesses; and now that

(*a*) 1 Taunt. 118.

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a commission is pending to examine witnesses, the plaintiff could not go to trial. The defendants have given no notice of the abandonment of the Judge's orders obtained by them for commissions to examine their witnesses; and, till those commissions are returned, the plaintiff is forbidden, by the terms of the orders, to go to trial. He referred to *Doe* d. *Stanley* v. *Towgood* (*a*).

Bramwell, in support of the rule. The defendants were entitled in Hilary or Easter Terms last to the present motion, and they have a right now to proceed on the default then existing. The terms imposing a stay of trial in the cause do not extend to a stay of proceedings. The case of *Spurr* v. *Rayson* (*b*) is an authority in favour of the defendants. The marginal note at first sight seems against them; but the facts of the case are in favour of the view submitted. There a defendant, in a situation to obtain a rule absolute for a nonsuit, agreed to refer the case, and the reference afterwards going off, it was held that the defendant was remitted back to his right from the prior default, to insist on a peremptory undertaking.

PATTESON, J.—That case is also reported in 7 *Dowl.* 467, and with some little difference. There *Parke*, B., seems to have considered that the defendant had waived his right to insist on a breach of the peremptory undertaking, by submitting to an award; and that the parties were restored to the same situation as when the peremptory undertaking was given; and a complete default having at that time been made, the defendant was entitled to a fresh peremptory undertaking. Here the case is different, as no motion for judgment as in case of a nonsuit has been made until after a commission to examine witnesses has issued, which directs that the trial shall not be proceeded with till the return of the commission. I

(*a*) 2 Dowl. 404.

(*b*) 5 M. & W. 339; S. C. *nom. Spurr* v. *Rayson*, 7 Dowl. 467.

therefore think that the defendants have waived any right they might have had by a prior default, and that, consequently, the present rule must be discharged. As, however, the case cited may have been thought to be an authority, it will be discharged, without costs.

Rule discharged, without costs.

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A WRIT of habeas corpus had been obtained, directed to Noel Thomas Smith, Esq., doctor of medicine, keeper or proprietor of the Newcastle-upon-Tyne lunatic asylum, and to the superintendent of the said asylum, commanding them to bring up the body of Robert Fell, being in their custody, "together with the day and cause of his being taken and detained."

The return was in the following terms:—

The return to a habeas corpus to bring up the body of an alleged lunatic, stated that, "on, &c., under the authority and in pursuance of the act of Parliament," &c. (2 & 3 Wm. 4, c. 107,) "R. F. in the said writ named was committed under our custody, and was received into and detained in the Newcastle Lunatic Asylum," &c., and that "on the day and year aforesaid," an order and medical certificates were received, which were as follow:

We, Noel Thomas Smith, Esq., doctor of medicine, keeper or proprietor of the Newcastle-upon-Tyne lunatic asylum, and Donald Macintosh, doctor of medicine, superintendent of the said asylum, certify to the right honorable Thomas, Lord Denman, her Majesty's Chief Justice named in the writ annexed to this Schedule, that before the coming of the said writ to us, to wit, on the 17th day of February, in the sixth year of the reign of her Majesty Queen Victoria, and in the year of our Lord, 1843, and under the authority, and in pursuance of the act of Parliament passed in the second and third years of the reign of his Majesty King William the Fourth, intituled, "An Act

It then set out the order for the reception of the lunatic, with the signature of the patient himself at the foot of it, instead of that of his wife, who was the party named in it as giving the order, and who had also signed the order in a different place; and also medical certificates. It likewise set out a subsequent order under the 8 & 9 Vict. c. 100, and medical certificates, and justified the detainer of the lunatic under the latter order.

Held, that it sufficiently appeared, on the face of the return, that the first order and medical certificates were received at the same time with the lunatic; that under the 2 & 3 Wm. 4, c. 107, the first order was a sufficient justification of the detainer; that it was not necessary to obtain an order for his detainer under the 8 & 9 Vict. c. 100; and that the return need not shew who delivered the first order.

Semble, that a medical certificate under the 8 & 9 Vict. c. 100, s. 46, should state specific facts on which the opinion of insanity has been formed; and that therefore the statement that the patient has "a general suspicion of the motives of every person" is insufficient.

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for regulating for three years, and from thence until the end of the then next session of Parliament, the care and treatment of insane persons in England," Robert Fell, in the said writ named, was committed under our custody, and was received into, and detained in the Newcastle-upon-Tyne lunatic asylum, the said asylum being a house licensed for the reception of insane persons in that part of the United Kingdom called England, pursuant to the said act of Parliament; and that on the day and year aforesaid we received an order, under the hand of Maria Fell, the wife of the said Robert Fell, together with medical certificates of two surgeons, in the manner and form directed by the said act, which said order and medical certificates were in the words and figures following, that is to say:

"Statement and Order to be annexed to the medical certificates authorizing the reception of an insane person.

The patient's true Christian name and surname at full length - - - -	Robert Fell.
The patient's age - - - -	47.
Married or single - - - -	Married.
The patient's previous occupation (if any) -	None.
The patient's previous place of abode -	Cumberland Row, Newcastle.
The licensed house or other place (if any,) in which the patient was before confined -	Newcastle asylum.
Whether found lunatic by inquisition, and date of commission	
Special circumstance which shall prevent the patient being separately examined by two medical practitioners	
Special circumstances which exist to prevent the insertion of any of the above particulars	

"Sir,

Upon the authority of the above statement, and the annexed medical certificates, I request you will receive the said Robert Fell as a patient into your house.

I am, Sir, your obedient servant.

Name - - -	Robert Fell.
Occupation (if any) - -	None.
Place of abode - -	23, Cumberland Row, Newcastle.
Degree of relationship (if any) to the insane person - -	Wife,—Maria Fell.

Date, 17th February, 1843.
Maria Fell."

"To Noel Thomas Smith, M.D., Proprietor
of the Newcastle Lunatic Asylum."

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"Medical Certificates.

"I, the undersigned, hereby certify, that I separately visited and personally examined Robert Fell, the person named in the annexed statement and order, on the 17th day of February, 1843, and that the said Robert Fell is of unsound mind, and a proper person to be confined.

Name - - - -	John Sang.
Physician, Surgeon, or Apothecary	Surgeon.
Place of abode - - -	Cross House, Fenkle Street."

"I, the undersigned, hereby certify, that I separately visited and personally examined Robert Fell, the person named in the annexed statement and order, on the 17th of February, 1843, and that the said Robert Fell is of unsound mind, and a proper person to be confined.

Name - - - -	Wm. Hardcastle.
Physician, Surgeon, or Apothecary	Surgeon.
Place of abode - - -	Newcastle."

And we further certify, that on the 22nd day of November, in the ninth year of the reign of her said Majesty Queen Victoria, and in the year of our Lord, 1845, and under the authority, and by virtue of an act of Parliament passed in the eighth and ninth years of the reign of her said Majesty Queen Victoria, intituled, "An Act for the regulation of the care and treatment of Lunatics," an order and two medical certificates, in the form prescribed by the last mentioned act, were delivered to us; which last mentioned order and medical certificates were in the words and figures following, that is to say:

"Order for the reception of a private patient.

"Schedule B.

"I, the undersigned, hereby request you to receive Robert Fell, a person of unsound mind, as a patient into your house. Subjoined is a statement respecting the said Robert Fell.

(Signed) name - - - -	Maria Fell.
Occupation (if any) - - -	None.
Place of Abode - - - -	23, Cumberland Row, Newcastle.
Degree of relationship (if any,) or other circumstances of connection with the patient -	Wife.
Name of patient, with Christian name at length	Robert Fell.
Sex and age - - - -	Male—50.
Married, single, or widowed - - -	Married.
Condition of life and previous occupation (if any)	No occupation.
Previous place of abode - - -	Cumberland Row, Newcastle.

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Religious persuasion, so far as known	Established Church.
Duration of existing attack	Several years.
Whether first attack	Not.
Age, if known, on first attack	39.
Whether subject to epilepsy	Not.
Whether suicidal or dangerous to others	Dangerous to others—suicidal.
Previous place of confinement (if any)	Newcastle asylum and Dunston Lodge.
Whether found lunatic by inquisition, and date of commission	Not.
Special circumstances (if any) preventing the patient being examined before admission separately by two medical practitioners	No special circumstances.
Special circumstances (if any) preventing the insertion of any of the above particulars	None.
(Signed) Name	Maria Fell.

"Dated this 22nd day of November, 1845.

"To Noel Thomas Smith, M.D., Proprietor of
Newcastle-upon-Tyne Lunatic Asylum."

"Medical Certificate in the case of a private patient.

"Schedule C.

"I, William Hardcastle, being a surgeon duly authorized to practice as such, hereby certify that I have this day, separately from any other medical practitioner, visited and personally examined Robert Fell, the person named in the accompanying statement and order, and that the said Robert Fell is a person of unsound mind, and a proper person to be confined; and that I have formed this opinion from the following fact, viz., a general suspicion of the motives of every person.

(Signed) name	Hardcastle, M.R.C.S.
Place of abode	Newcastle-upon-Tyne.

"Dated this 21st day of November, 1845."

"Medical Certificate in the case of a private patient.

"Schedule C.

"I, John Sang, being a surgeon duly authorized to practice as such, hereby certify that I have this day, separately from any other medical practitioner, visited and personally examined Robert Fell, the person named in the accompanying statement and order, and that the said Robert Fell is a person of unsound mind, and a proper person to be confined; and that I have formed this opinion from the following fact,

viz., from his general suspicious and morbid state of mind, and making ungrounded statements in every conversation.

(Signed) name - - John Sang.
Place of abode - - Fenkle Street, Newcastle-upon-Tyne.

"Dated this 22nd day of November, 1845."

And we further certify, that the said Robert Fell is of unsound mind, and that the said Robert Fell is now detained under our custody under and by virtue of the last mentioned act of Parliament, and that the cause of taking and detaining the said Robert Fell is herein stated or appears; and that we have the body of the said Robert Fell ready, as by the said writ we are commanded.

The answer of Noel Thomas Smith, keeper or proprietor of the Newcastle-upon-Tyne lunatic asylum, and of Donald Macintosh, the superintendent of the said asylum.

Which return being filed and read, and Robert Fell, the alleged lunatic, being in Court,

Granger moved that he be discharged. It is submitted that this return is insufficient. The first question will be, whether a party having a lunatic in illegal custody, under informal documents, can, when a writ of habeas corpus is procured to discharge him out of custody, obtain fresh documents under which to detain him, and return those as his authority in answer to the writ. The writ requires that he shall set out the day and cause of his being *taken* and detained; and in *Bushell's case* (*a*), it is said, that a return to be good must set forth the day and cause of *caption* as well as of detainer. It is apprehended that if this be so, a return is insufficient which sets out an insufficient cause of caption, although the cause of detainer might otherwise be good enough. It is true that in the case of *In re Walker* (*b*), the Court remanded the prisoners to custody where it appeared that warrants of commitment had been made out after the prisoners were in custody, which recited legal convictions. And in the case of magistrates, it has

(*a*) Vaugh. 135.

(*b*) 1 Car., Ham. & Allen's New Sess. Cases, p. 182; See S. C. nom. *The Queen* v. *Richards*, 5 Q. B. 926.

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been always held, that they may substitute at any time before the return, a legal conviction for a faulty one; *Elizabeth Warman's case* (*a*). But such cases stand on a different footing from the present; and it is submitted, that it would be contrary to the policy of the statutes which regulate the treatment and custody of insane persons, and contrary indeed to common sense, that a party should be placed in a lunatic asylum, without those formalities which the statute prescribes being complied with; and then, that being there, he could be treated as a person regularly within a lunatic asylum, and an order, as in such cases, made, upon which his detainer could be justified. The act under which the first order is made, is the 2 & 3 Wm. 4, c. 107, which is repealed by the 8 & 9 Vict. c. 100, under which the second order is made. It is clear, from the 99th section (*b*) of the latter act, that the keeper of a

(*a*) 2 W. B. 1204.

(*b*) Sect. 99. "That every proprietor and superintendent of a licensed house or registered hospital, and every other person hereby or by any of the acts herein-before repealed authorized to receive or take charge of a lunatic upon an order, and who shall receive or has received a proper order in pursuance of this act or any of the said repealed acts, accompanied with the required medical certificates or certificate, for the reception or taking charge of any person as a lunatic, and the assistants and servants of such proprietor, superintendent or other person, shall have power and authority to take charge of, receive, and detain such patient until he shall die, or be removed or discharged by due authority, and in case of the escape at any time or times of such patient to retake him at any time within fourteen days after such escape, and again to detain him as aforesaid; and in every writ, indictment, information, action, and other proceeding which shall be preferred or brought against such proprietor, superintendent, or other person authorized as aforesaid, or against any assistant or servant of any such proprietor, superintendent, or authorized person, for taking, confining, detaining, or retaking any person as a lunatic, the party complained of may plead such order and certificates or certificate in defence to any such writ, indictment, information, action, or other proceeding as aforesaid, and such order, and certificates or certificate shall, as respects such party, be a justification for taking, confining, detaining, or retaking such lunatic or alleged lunatic."

lunatic asylum is only authorized to detain a lunatic, where he "shall receive or has received a proper order in pursuance of this act or any of the said repealed acts, accompanied with the required medical certificates or certificate, for the reception or taking charge of any person as a lunatic." It is evident, from the language of the 45th and 47th sections (*a*), that the order to be obtained, is an order

(*a*) Sect. 45. "That no person (not a pauper), whether being or represented to be a lunatic, or only a boarder or lodger, in respect of whom any money shall be received or agreed to be received for board, lodging, or any other accommodation, shall be received into or detained in any licensed house, and no person (not a pauper) shall be received into or detained as a lunatic in any hospital, without an order under the hand of some person according to the form, and stating the particulars required in Schedule (B) annexed to this act, nor without the medical certificates, according to the form in Schedule (C) annexed to this act, of two physicians, surgeons, or apothecaries who shall not be in partnership, and each of whom shall separately from the other have personally examined the person to whom it relates, not more than seven clear days previously to the reception of such person into such house or hospital, and shall have signed and dated the same on the day on which such person shall have been so examined; and every person who shall receive or detain any such person as aforesaid in any such house or hospital as aforesaid without such order and medical certificates as aforesaid, and any physician, surgeon, or apothecary who shall knowingly sign any such medical certificate as aforesaid which shall untruly state any of the particulars required by this act, shall be guilty of a misdemeanor."

Sect. 47. "That any person (not a pauper) may, under special circumstances, be received into any such house or hospital as aforesaid, upon such order as aforesaid, with the certificate of one physician, surgeon, or apothecary alone, provided that such order state the special circumstances which have prevented the person from being examined by two medical practitioners; but in every such case another such certificate shall be signed by some other physician, surgeon, or apothecary, not being connected with any such house or hospital, who shall have especially examined such person within three days after his reception into such house or hospital; and every person who having received any person into any house or hospital as aforesaid, upon the certificate of one medical practitioner alone, as aforesaid, shall keep or permit such person to remain in such house or hospital beyond the said period of three days without such further certificate as aforesaid, shall be guilty of a misdemeanor."

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previous to the admission of the lunatic, and under which the keeper of the lunatic asylum may justify as well his reception as his detainer. It is submitted, besides, that this return is bad on several formal grounds. It states, that on the 17th of February, 1843, "*under the authority*, and in pursuance of the act of Parliament passed in the second and third years of the reign of his Majesty king William the Fourth," &c., Fell "was committed under our custody, and was received into and detained in," &c. It should have stated, that he was received *under the authority of an order and medical certificates* as prescribed by the act. The first order is defective for containing the patient's name in the place where there should be that of the party who gives the order to detain him; while at the foot of the order is given the name of "Maria Fell," and the description of the person giving the order, is that of "Wife, Maria Fell." As the residence stated is that also of the lunatic, it does not sufficiently appear that the statute has been complied with, which requires the residence of the party giving the order to be stated. The second order is defective in this, that there is nothing to shew that it applies to the same Robert Fell who is detained under the first order. The return at most amounts to this, that he was received under the first act, and detained under the latter. It must be shewn that the party was legally in custody from the time of the arrest down to the time of the return. By the 46th section (*a*), the medical certificates should contain the fact or facts upon which the medical man has formed his opinion that the party is insane, and whether those facts arise from his own observation, or from the information of any other person. It is evident from this being required, that the Legislature intended that the ground

(*a*) Sect. 46. "That every physician, surgeon, or apothecary signing such certificate shall specify therein any fact or facts (whether arising from his own observation or from the information of any other person) upon which he has formed his opinion that the person to whom such certificate relates is a lunatic or an insane person, or an idiot, or a person of unsound mind."

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stated should be one from which the lunacy of the patient might be readily inferred. Here the only ground stated in one of the medical certificates, is "a general suspicion of the motives of every person;" which is evidently inadequate to the conclusion drawn, namely, that the party is insane. It does not state whether this ground is derived from his own observation, or that of others. It is nowhere stated that the order was received from the wife of the lunatic, or that the medical certificates were given before the reception of the patient. He referred to *In re Elmy* and *Sawyer* (*a*), and *The Queen* v. *Inhabitants of Skipton* (*b*).

Unthank, contrà. It is submitted that the return is sufficient. The first order is a sufficient answer to the writ; but even if it should be held otherwise, the detainer of the lunatic may well be justified under the second order; and it cannot be necessary that he should have been first discharged out of the asylum in order to make that order effective. It is said, indeed, that otherwise the intention of the statutes will be defeated, and great injustice may be done; but there are most stringent provisions in both acts for the protection of lunatics. The houses in which they are confined are to be licensed, and visited by magistrates, accompanied by a medical man, who have power to investigate into the cases, and to discharge any person whom they may think to be improperly confined. It is submitted, either that the first order is valid, and still subsists, or that the second order is a sufficient justification of the detainer; and that the Court will not, under the circumstances, order the party to be discharged. It is true that the return, as is stated in *Bushell's case* (*c*), and in *Com. Dig.* tit. "*Hab. Corp.*" (E. 2), must shew the cause of commitment as well as detainer; but it is in the discretion of the Court, even where the

(*a*) 1 A. & E. 843.

(*b*) 1 Car., Ham. & Allen's New Sess. Cases, p. 350.

(*c*) 1 Vaugh. 135.

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commitment is informal, to remand the party to his former custody, if they think that justice requires it. In the present case, if there were any informality in the return, the Court would, on the petition of the keeper, postpone the case, in order to give an opportunity of having it amended. But it is submitted that the return is good. The first order is in the form prescribed by the 27th section, and given in the schedule to the act (B). It is true that the name of Robert Fell has been erroneously inserted as the person by whose order the patient was to be received. But this could have led to no mistake, as it is also subscribed underneath by the wife, Maria Fell. As she is stated to be the wife of the lunatic, it may be reasonably inferred that she was living with him at the time of the order, and that his residence was also her's. All that the 27th section of the 2 & 3 Wm. 4, c. 107, requires, is, that there shall "be an order, under the hand of the person by whose direction such insane person is sent;" which form shall contain certain particulars. Those particulars are contained in the present order. This order is still valid; for the 8 & 9 Vict. c. 100, s. 1, in repealing the former statutes, enacts that "all orders, matters, and things which have been granted, made, done, or directed to be done in pursuance of the said repealed acts or any of them shall be and remain as good, valid, and effectual to all intents and purposes as if the said repealed acts had not been repealed, except so far as such orders, matters, or things are expressly made void or affected by this act." But even supposing that the first order were invalid, the second order would act as an authority to the proprietor of the lunatic asylum for keeping the lunatic in his custody. The 2 & 3 Wm. 4, c. 107, s. 27, only requires an order on *receiving* a lunatic into an asylum; the 8 & 9 Vict. c. 100, s. 99, it is submitted, renders an order under this act an authority for *detaining* a lunatic already in custody. As to the objection which has been raised to the certificates, the rules of special pleading are not to be admitted in their construction. The

reasons given are such as may fairly have contributed to forming the opinion of the medical man as to the insanity of the patient. It is not necessary that it should appear on the face of the return, that the order was received from the party making it; or that the certificates were given before the reception of the lunatic.

Granger was heard in reply.

PATTESON, J.—I should be very sorry to be supposed to hold that if a party were improperly taken and confined in a lunatic asylum, the obtaining an order and medical certificates subsequently could be considered as sufficient to justify his detainer. It is clear, I think, from the language of the acts, that the order and certificates must be obtained at the time. The point as to whether this party is or is not a lunatic, has very properly not been urged; and the simple question is, as to the validity of the return. I cannot think that the last act renders it necessary, where a party has been received into a lunatic asylum, under the former act, that a fresh order and certificates should be obtained to justify his detainer; for it would be a fearful thing to hold that all persons confined in lunatic asylums were to be discharged by the operation of the last act. This view is supported by the language of the 99th section, which justifies the detention, by the keeper of a lunatic asylum, of any person for whom he "shall receive or *has received* a proper order in pursuance of this act, or any of the said repealed acts." At the same time I am not surprised that the parties should have thought it necessary to obtain a fresh order. The question therefore, is, whether the first order is sufficient. It is said that the statements in the return are not sufficiently connected together, so as to shew that Mr. Fell was received and detained under the authority of the order and certificates therein mentioned. I do not think that we ought to look at a return with the same

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strictness, as if it were a special plea. If it reasonably appear upon the face of it that the party is properly in custody, that is sufficient. Now, in the present case, it states, that the person in question was received under the 2 & 3 Wm. 4, c. 107, and that the keeper of the asylum did receive an order and certificates, copies of which are set out in the return; but it is not expressly stated that they were received *before* the reception of the lunatic. I think, however, it is sufficient if they were received at the same time with the lunatic; and that they were so received I think sufficiently appears upon the face of this return. It is also said that it does not appear by whom the order and certificates were delivered. I do not see the necessity for such a statement; for I think it sufficiently appears that the order and certificates returned, were those under which the lunatic was received. Then we come to the question whether the first order and certificates are sufficient. Now I think there is nothing in the objection that the name of Robert Fell has been inserted in the order instead of the wife's name; and considering that this order was lodged so long ago as in 1843, it is rather too much to come now and object to what is clearly a clerical error and could not have misled. I was at first struck with the objection that the wife's place of abode was not stated; but I think that the residence stated in the order may be fairly inferred to be that of the wife. It is true that it is also stated to be the residence of the lunatic himself; but as the person sending him was his wife, I think it must be taken to be her residence also. I therefore think that this order of detainer was right, and that the party is not entitled to be discharged. These statutes were passed for the benefit of the public, and would be rendered useless if such technical objections were entertained. I do not say whether if the first order had been bad, the second would have cured it; for it has become unnecessary to decide that point; but I would not have it thought that I consider the

reasons given in the medical certificate to be sufficient. I am inclined to think they are not; but I form my opinion as to the return solely on the validity of the first order.

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Granger. The return does not claim to detain the party under the first order. He is therefore entitled to his discharge.

PATTESON, J.—Then I will permit the return to be amended, if necessary, in this respect.

Lunatic remanded.

REGINA *v.* THE NORWICH AND BRANDON RAILWAY COMPANY.

THIS was a rule calling on the Norwich and Brandon Railway Company to shew cause why a writ of mandamus should not issue directed to them, commanding them to construct and make a certain bridge, for carrying the railway over the river Yare, at the hamlet of Lakenham, in the county of the city of Norwich, so and in such manner as to leave the same width of water-way under the same as existed at the time of the passing of the act of Parliament of the seventh year of the reign of her present Majesty,

By the Norwich and Brandon Railway Company Act, 7 Vict. c. 15, (local, personal and public) s. 221, the company were empowered to build and repair a bridge over a certain river, keeping a certain height above the water, and a certain width of water-way. They had proceeded in the construction of the bridge, leaving a less width and heighth than prescribed; whereupon the proprietors of a mill on the river whose flow of water was injured thereby, wrote requiring them to make it of the width and heighth prescribed by the act. To this the solicitors of the railway company replied that the company would make it of the required height, but as to the other matter referred to in the letter, they were instructed to accept service of any process which the parties might think proper to issue. A second, and then a third letter were written requiring compliance, to which the company returned no answer. It however appeared that the company had since proceeded to make some of the alterations required: *Held*, that under these circumstances, there had been a sufficient refusal to warrant the issuing a mandamus.

The same section which empowered the company to build and repair the bridge, enacted that in the event of the bridge not being built, maintained and repaired, it should be lawful for the owner of adjoining lands to do so, and for a justice of the peace to order the company to pay him the expenses of so doing: *Held*, that the parties were not compelled to take the course pointed out by this section; but might proceed by mandamus.

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intituled "An Act for making a Railway from Norwich to Brandon, with a branch to Thetford," (7 Vict. c. 15, local, personal, and public,) at the point where the said river is crossed by the said bridge.

The affidavits on which the rule nisi was obtained, stated that a certain mill, called the Lakenham Yarn Mill, situated at Lakenham, had belonged to one E. W. Trafford, Esq., who had demised it to the Norwich Union Life Insurance Society, at whose instance the application was made; that the Railway Company had commenced in August, 1844, to build a bridge over the river about a thousand yards from the mill, but without giving the Insurance Society any intimation of their intention; that on the 10th of September, in that year, the directors of the Insurance Society ascertained that the bridge was supported by twenty-eight piles, each about thirteen inches square, driven into the river and standing in eight lines across the water-way; and that the longitudinal beams of the bridge were fixed so as to leave a height of three feet ten inches only above the ordinary surface of the water: whereas the act of Parliament required five feet, and the same width of water-way as before. That they immediately caused a notice to be served upon the Railway Company, requiring them to construct the bridge so and in such a manner as to leave the same width of water-way under the said bridge, as at the time of the passing of the said act existed at the point where the river was crossed by the railway, and so and in such manner as that there should be at all times a clear height of five feet above the ordinary level, or usual water-mark of the river under such bridge, for the passage of boats; that they also gave notice to the Railway Company that the piles and timber placed across the river were an impediment to the free and regular passage of the water to their mills, and diminished the accustomed width of water-way, and did not leave a clear height of five feet above the level of the river. That an answer was received on the 21st of September, from the solicitor to the Railway

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Company, who, in acknowledging the receipt of the foregoing notice, stated that it was the intention of the Railway Company to form the bridge in such a manner as to leave the clear height of five feet above the ordinary level or usual water-mark of the river under such bridge; and as to the other matters referred to in the notice, that they were instructed to receive any process which the Insurance Society might think proper to institute in respect thereof. That on the 25th of September, the Insurance Society again wrote to the solicitor of the Railway Company, and stated that they were not satisfied with the bridge being made so as to leave five feet clear height above the ordinary level of the bridge, unless the same width of water-way were left under the bridge as existed at the time of the passing of the act; and that they insisted on the bridge being made according to the letter and meaning of the act in every respect. That no notice being taken of this letter, the Insurance Society again wrote to the solicitor of the Railway Company on the 21st of October, stating, that although the Railway Company had altered the bridge, so far as related to the height above the level water, the width remained the same, and the impediment to the free flow of water and passage of boats, by reason of the piles and timber driven into the water, continued; and requesting to know whether the Railway Company meant to alter the works in these respects, or to try the question as they then stood. That no reply whatever had been received.

A rule nisi for a mandamus was obtained in Michaelmas Term, 1844.

The affidavits, in answer (*a*), stated, that instructions had been given by the Railway Company to their engineer, in October, 1844, to widen the river at and under the site of the bridge, by a cutting on the west side thereof, to be laid into and united with the original stream, and to be of the

(*a*) The rule was enlarged, and the affidavits in answer filed in Hilary Term, 1845.

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average depth of six feet, and of the width of fifty feet on the north side of the bridge, and increasing to sixty-six feet on the south side, and continued on each side of the bridge, so as to join the original banks of the stream without making any angle; that some delay had occurred from a difficulty in obtaining materials and some other causes; that the works for widening the river were begun on the 27th of October, but were stopped early in November, in consequence of the floods in the river which had then begun; that they were prepared to continue the same, and were only waiting till the weather and the state of the water would permit, which they would not at that time; and that the tenant of the mill had been informed of the Railway Company's intention to widen the river, when the instructions were given to their engineers, and before they were commenced.

Gurdon now shewed cause. The Court, it is submitted, will not grant a mandamus to a public body to perform an act, unless there has been a direct refusal by them to do it, or there has been such conduct on their part as is equivalent to a direct refusal; *Rex* v. *Brecknock and Abergavenny Canal Company* (*a*); *Rex* v. *The Wilts. and Berks. Canal Company* (*b*). In *Regina* v. *The Bristol and Exeter Railway Company* (*c*), the Court refused to grant a mandamus when no direct refusal appeared, although the Company there had only a limited time within which to perform the works by the terms of their act, and that time had expired. Here there has been no direct refusal in terms; and the Court cannot infer one, as the affidavits shew that in point of fact the Company did comply with the requisitions stated in the notice of the Insurance Society, until they were prevented from proceeding further by the advanced period of the year and the state of the

(*a*) 3 A. & E. 217; S. C. 4 N. & M. 871.

(*b*) 3 A. & E. 477; S. C. 5 N. & M. 344.

(*c*) 4 Q. B. 162; S. C. 3 G. & D. 384.

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weather. There is, however, a further answer to the present rule. By the 241st section of the act (*a*), in the case of the bridge not being properly built, according to the true intent and meaning of the act, another remedy is given, by application to a justice of the peace, who is authorized to grant an order to the party to make the bridge, the expenses of which are to be borne by the Railway Company. The act having pointed out a specific legal remedy, the party is bound to pursue it, and cannot come to this Court for a mandamus. Besides, by section 242 (*b*), the Company may alter the course of any river,

(*a*) Sect. 241. It was enacted, "that in making the said railway through the estate of the said R. W. Trafford, Esqr., in the parish or hamlet of Lakenham, the said company shall" (make certain ditches, and lay down a certain tunnel), and "construct or cause to be constructed, and for ever keep in repair the bridge for carrying the railway over the said river," (the river Yare) "so as to leave the same width of water-way under the same as at present exists, at the point where the said river will be crossed, and so that there shall be at all times a clear height of five feet above the ordinary level or usual water mark of the said river under such bridge for the passage of boats; and if at any time after notice in writing shall be given to the said company by or on the behalf of any owner or occupier of lands adjoining or lying near to the said railway that the said ditches or the said tunnel or bridge or any of them, or any part thereof, are or is not made, cleansed, maintained and repaired, according to the true intent and meaning of this act, it shall be lawful for any such owner or occupier, from time to time as often as there shall be occasion, to apply for and obtain an order in writing from any one or more justice or justices of the peace for the city of Norwich and county of the same city, and the said justice or justices is and are hereby authorized and required, at his or their discretion, to grant such orders as aforesaid, enabling such person to make, cleanse, and repair such ditches, tunnel, and bridge accordingly; and the reasonable expenses thereof (to be ascertained by the said justice or justices) shall be defrayed by the said company; and in case of neglect or refusal to satisfy and defray such expenses for the space of fourteen days after demand thereof made upon the said company, such expenses shall and may be recovered and levied by such owner or owners, occupier or occupiers, in such manner as any other money is by this act directed to be recovered from the said company."

(*b*) Sect. 242 enacts, "that,

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not a navigable one (which this is not), and if any damage be committed in so doing, compensation must be sought in the manner pointed out by the act.

The *Solicitor General* (with whom was *Cleasby*), in support of the rule. It is submitted that the conduct of the Railway Company is equivalent to a direct refusal. By their letter of the 21st of September, they say they are willing to comply with the requisitions of the Insurance Society so far as regard the height of water; but that as to the rest, they are ready to accept any process the Insurance Society may think proper to institute against them. This, it is submitted, is equivalent to a direct refusal; especially when coupled with their silence with respect to the two subsequent letters which were sent to them, demanding compliance with the terms of the act, as regarded the width of water-way. In *Rex* v. *The Wiltshire and Berkshire Canal Company* (*a*), the demand seems to have been made on the wrong party; and in *Regina* v. *The Bristol and Exeter Railway Company* (*b*), the opportunity was not afforded the Company of exercising the option

subject to the provisions and restrictions contained in this act, it shall be lawful for the company, for the purpose of constructing the railway, to execute" (amongst others) "the following works:"—"They may alter the course of any rivers not navigable, canals, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, if necessary, for constructing and maintaining tunnels, bridges, passages, or other works over or under the same; and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper:"—"provided always, that in the exercise of the powers hereby granted the company shall do as little damage as can be, and shall make full satisfaction, in manner herein provided, to all parties interested for all damages by them sustained by reason of the exercise of such powers."

(*a*) 3 A. & E. 477; S. C. 5 N. & M. 344.

(*b*) 4 Q. B. 162; S. C. 3 G. & D. 384.

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which the act gave them, of altering the work themselves. It is left in uncertainty, on the affidavits of the Company, whether even had they gone on with the works described in October, they would have completed the bridge as required by the act. They ought to have sworn that by means of the works the water-way would be left in the same state as at the passing of the act. They refuse to answer the letters of the Insurance Society; and now rely on having complied with their terms. If the works are being properly carried out, that will be an answer on the return. As to the objection that another remedy is given by the 241st section, it is clear that that section does not apply to a case like the present, where the object is to prevent the Company from improperly constructing a bridge, not to enable the party to build one himself. [*Patteson*, J.—The statute does not say that the justices shall have power to order the Company to build the bridge. It would be very hard if a party were confined to the remedy of pulling down the bridge and building up a new one.] As to section 242, it is impossible to argue that it applies to the bridge expressly mentioned in the preceding section. [They were then stopped].

PATTESON, J.—I do not wish to express any opinion as to what the words "so as to leave the same width of water-way under the same" mean—whether they mean that the Company should throw a single arch over the river, so as to leave the channel untouched, or that they may widen the river and put piers in the middle, so as ultimately to leave the same width. I am, however, of opinion that this rule must be made absolute, and for this reason. Here is a letter written by the solicitors of the Railway Company, in answer to a letter from the Insurance Society, which makes two complaints; with the first of which they say the Railway Company will comply, but as to the other complaint, they say they are instructed to accept service of any

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process which the Insurance Company may think proper to bring against them. If the latter part of that letter is not a refusal by the Company, I confess I am at a loss to know what is to be considered as a refusal. No doubt something is afterwards done by the Railway Company towards removing the obstruction; but then two other letters are sent to them by the Insurance Society, to which they make no reply. If these Companies will take upon themselves to treat parties with so little respect, they must take the consequences upon themselves, and I cannot assist them. The rule will, therefore, be absolute.

Rule absolute.

VERBIST *v.* DE KEYSER.

To a declaration in assumpsit for money lent, money paid, and money due on an account stated, the defendant, who was under terms to plead issuably, pleaded, amongst other pleas, as to, &c., parcel, &c., accord and satisfaction, by an agreement by the plaintiff to give time in consideration of the defendant's undertaking to pay 4*s.* a week for interest until repayment of the principal, and to repay the principal as soon as his means would enable him, with an averment that the said rate of interest was different from and exceeded 5*l.* per cent. The plaintiff having signed judgment, as for want of a plea, *Held*, that the plea was an issuable plea within the terms of pleading issuably.

The declaration contained a count on a bill of exchange. The defendant paid money into Court thereon, and pleaded to the residue of declaration as above. The plaintiff having accepted the money out of Court, *Held*, on its being objected that such acceptance was a waiver of the objection to other pleas as non issuable, that it was no such waiver.

ASSUMPSIT against the defendant as acceptor of a bill of exchange for 5*l.* 6*s.* 6*d.*, drawn by one L. Le Paige on, and accepted by the defendant at six months, and indorsed by Le Paige to the plaintiff, with counts for money lent, money paid, and money due on an account stated.

The defendant, being under terms to plead issuably, obtained a rule of Court, under a Judge's order, for leave to plead as follows:

To the first count, payment of 5*l.* 17*s.* 8*d.* into Court.

To the residue of the declaration: first, non-assumpsit.

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Secondly, as to 186*l.* 16*s.* 9½*d.*, parcel of the residue; accord and satisfaction, by agreement by the plaintiff to give time, in consideration of the defendant's undertaking to repay the principal as soon as his means would enable him, and to pay interest at 5*l.* per cent. in the meantime.

Thirdly, as to the same sum, accord and satisfaction by another agreement to the same effect, in consideration of the defendant's undertaking to pay 4*s.* a week for interest until repayment of principal, and to repay principal as soon as his means would enable him; with an averment that the said rate of interest was different from, and exceeded 5*l.* per cent.

Fourthly, as to the same sum, accord and satisfaction by another agreement to the same effect, in consideration of the defendant's undertaking to pay interest at 5*l.* per cent., and repay the principal as soon as his means would enable him, and, in the meantime, to advance and pay, on account of such interest and of the principal respectively, 4*s.* a week.

The defendant delivered pleas accordingly, and, among the rest, the following second plea to part of the residue of the declaration:

"And for a further plea in this behalf, as to the sum of 186*l.* 16*s.* 9½*d.*, parcel of the said money mentioned in the said residue of the said declaration, over and above the said first count thereof, the defendant says, that after the said supposed causes of action in the said residue of the said declaration mentioned, as to the said sum of 186*l.* 16*s.* 9½*d.*, parcel, &c., had accrued, and after the making of the said supposed promises by the defendant in that behalf therein also mentioned, to wit, on the 24th day of May, A. D. 1843, an account in writing was had and stated by and between the plaintiff and the defendant, of and concerning the said supposed causes of action in the said residue of the said declaration mentioned, as to the said sum of 186*l.* 16*s.* 9½*d.*, parcel, &c., and it was then therein and thereby acknowledged by the plaintiff, that he, the said plaintiff, had

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advanced and paid the same for the defendant for the purpose of establishing him in the business of an hotel and coffee-house. And the defendant in fact further says, that thereupon afterwards, to wit, on the day and year last aforesaid, it was agreed by and between the plaintiff and the defendant as follows, that is to say, that in consideration of the premises, and of the forbearance by the plaintiff as hereinafter in this plea mentioned, he, the defendant, thereby then, at the request of the plaintiff, promised and agreed, to and with the plaintiff, to pay him *interest on the said sum of* 186*l.* 16*s.* 9½*d.*, *at the rate of* 5*l. per cent., per annum, and to repay the said sum of* 186*l.* 16*s.* 9½*d.*, *so due from him, the said defendant, to the plaintiff, as soon as the defendant's means should enable him to do so.* And he, the said plaintiff, thereby then, in consideration of the premises, at the request of the defendant, promised and agreed, to and with the defendant, that in the mean time, and until the defendant's means would enable him to repay the said sum of 186*l.* 16*s.* 9½*d.*, so due from him to the plaintiff as aforesaid, he, the said plaintiff, should and would forbear and give day of payment of the said sum of 186*l.* 16*s.* 9½*d.*, to the defendant. And the defendant in fact further says, that he then made and entered into the said agreement on his part, and promised and agreed as in this plea in that behalf above mentioned, in full satisfaction and discharge of the said supposed causes of action in the said residue of the said declaration mentioned, as to the said sum of 186*l.* 16*s.* 9½*d.*, parcel, &c., and of the said supposed promises by the defendant in that behalf therein also mentioned. And he, the said plaintiff, then accepted and received, of and from the defendant, the said making and entering into the said agreement on his part, and his said last mentioned promise and agreement respectively, in full satisfaction and discharge of the said supposed causes of action in the said residue of the said declaration mentioned, as to the said sum of 186*l.* 16*s.* 9½*d.*, parcel, &c., and of the

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said supposed promises by the defendant in that behalf therein also mentioned. And the defendant in fact further says, that he wholly laid out and expended the said sum of 186*l.* 16*s.* 9½*d.*, in and about the establishing of him, the said defendant, in the said business of an hotel and coffee-house. And the defendant in fact further says, *that from the time of making the said agreement in this plea above mentioned, up to the commencement of this suit, he, the defendant, paid to the plaintiff interest on the said sum of* 186*l.* 16*s.* 9½*d.*, *at the rate of* 5*l. per cent., per annum, according to the tenor and effect of the said agreement on his, the said defendant's part,* and of his, the said defendant's said promise and agreement in this plea in that behalf above mentioned, and hath been always ready and willing to perform and fulfil the said agreement on his part, and his said promise and agreement in this plea in that behalf above mentioned, in all other things on his part to be performed and fulfilled. And the defendant in fact further says, that his means had not, up to the commencement of this suit, nor have they since hitherto in any way enabled him, the defendant, to repay the said sum of 186*l.* 16*s.* 9½*d.*, so due from him to the plaintiff as aforesaid, or any part thereof; of all which said several premises the plaintiff always, up to and at the time of the commencement of this suit, had notice."

The third plea to the same part of the residue of the declaration was like the second, but varied from it in stating the agreement and promise to be, instead of the passage above printed in *italics*, to pay the plaintiff "4*s.* in each and every week for interest on the said sum of 186*l.* 16*s.* 9½*d.*, beginning on Saturday then next, to wit, on the 27th day of May, in the year last aforesaid, and to repay the said sum of 186*l.* 16*s.* 9½*d.*, so due from him the said defendant to the plaintiff, as soon as the defendant's means should enable him to do so." The averment of performance followed the difference of the promise alleged. And the plea concluded with an averment "that the interest agreed

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for and paid was interest at a rate different from and far exceeding the rate of interest at 5*l.* per cent. per annum."

The fourth plea to the residue of the declaration was also like the second, but varied from it in stating the agreement and promise as follows, instead of the said passage printed in *italics*, viz. to pay the plaintiff "interest on this sum of 186*l.* 16*s.* 9½*d.*, at the rate of 5*l.* per cent. per annum, and to repay the said sum of 186*l.* 16*s.* 9½*d.*, so due from him, the said defendant, to the plaintiff, as soon as the defendant's means should enable him to do so, and, in the meantime, to advance and pay to the plaintiff, on account of the said last mentioned interest, and of the said sum of 186*l.* 16*s.* 9½*d.*, respectively, 4*s.* in each and every week, beginning on Saturday then next, to wit, on the said 27th day of May, in the year aforesaid." The averment of performance corresponded with the difference of the promise alleged.

The plaintiff accepted the sum paid into Court in satisfaction of the causes of action mentioned in the first count to which it was pleaded; and signed judgment as to the residue of the declaration as for want of a plea.

A rule having been obtained to shew cause why the judgment so signed should not be set aside for irregularity, with costs.

Bovill shewed cause. These pleas are not issuable within the meaning of the terms of pleading issuably; and are obviously framed with a view of inviting a demurrer. The second plea to the residue of the declaration professes to be a plea of accord and satisfaction, by an agreement to give time, in consideration of a promise to pay the debt, with interest on it; but it does not state from what time the interest is to be paid, or up to what period, and, therefore, is bad, as not stating the consideration with sufficient certainty. The third plea is, however, clearly bad. The same objection applies, that it does not state up to what period interest is paid; but it is open to this further, and,

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it is apprehended, fatal objection, that it discloses two grounds of defence; the one an agreement in accord and satisfaction; the other a defence under the usury laws. It is, therefore, impossible for the defendant to take issue on this plea, for if he deny the agreement, the defendant may rely on the defence of usury; and if he deny that portion of it averring usury, the defendant may rely on the agreement in accord and satisfaction. Neither do the pleas correspond with the abstract given; and the defendant is, therefore, in the condition of a party pleading several pleas without leave of a Judge, and the plaintiff is at liberty to sign judgment; Reg. Gen., Hilary Term, 2 Wm. 4, r. 34. It cannot be contended that the plaintiff, by accepting the sum paid into Court, has waived his right to sign judgment, for the payment into Court is in respect of the causes of action in the first count only; and the plaintiff has signed judgment as to the causes of action in the residue of the declaration, which remain unanswered, if these pleas are, as it is submitted, not issuable.

White, in support of the rule. First, as to the waiver, it is submitted, that the plaintiff, by accepting the money paid in on one of the pleas, has accepted the pleas generally, and, therefore, could not sign judgment (*a*). [*Patteson*, J.—There is nothing in that objection. You cannot contend that the plaintiff, by accepting the payment you offer as damages for his causes of action in the first count, thereby admits that you have offered any sufficient answer to the residue of the declaration. The plea of payment into Court is unlike any other plea.] Then with respect to the objection, that these pleas do not correspond with the abstract; it is not essential that the abstract should contain all the facts mentioned in the plea; it is sufficient if it

(*a*) See *Trott* v. *Smith*, 9 M. & W. 765; S. C. 2 Dowl. 278, N. S. *Stead* v. *Carey*, *ante*, vol. 2, p. 270; S. C. 8 Scott, N. R. 364; 7 M. & G. 646; *Scott* v. *Watson*, *ante*, p. 208.

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disclose the substantial defence in the plea. The rule of Trinity Term, 1 Wm. 4, r. 13, under which the abstract is furnished, only requires, that the rule to plead several matters "shall be drawn up on a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances." [*Patteson*, J.—I think these pleas sufficiently correspond with the abstract given of them.] It is submitted farther, that these pleas are strictly issuable pleas within the terms of the Judge's order to that effect. The objection as to duplicity in the third plea to the residue really amounts to nothing. The plea does not rest the defence on usury, but on accord and satisfaction, by entering into a special agreement, founded on a valid consideration. Indeed, the statute 2 & 3 Vict. c. 37, takes away all reason from the plaintiff for apprehending a defence under the old usury laws. And *Griffiths* v. *Owen* (*a*), is a direct authority that an agreement may well be pleaded in an action, like the present, as accepted in accord and satisfaction. In that case, *Pollock*, C. B., in delivering his judgment, says, "The present plea is in effect an attempt to extend to other causes of action the rule which applies merely to money demands. To an action for a money demand the debtor may plead payment, and therefore ought to be allowed also to plead anything which is equivalent to payment, and which the parties at the time agreed should be considered as payment." If the subject-matter of these pleas be true, the defendant could not plead, so as to avail himself of his defences, in any other way. [*Patteson*, J.—I do not see the object of the averment in the fourth plea, that the rate of interest exceeded 5*l.* per cent.] That averment was introduced in order to shew a benefit conferred on the plaintiff by the agreement, which, it is apprehended, may be necessary to

(*a*) 13 M. & W. 58; S. C. *ante*, vol. 2, p. 190. *White*, on moving for his rule, had mentioned *Swears* v. *Wells*, 1 Esp. 317, and *Sard* v. *Rhodes*, 4 Dowl. 743; S. C. 1 M. & W. 153.

make a plea of accord and satisfaction valid. Without the averment, the plea might not have disclosed a sufficient consideration for the acceptance of the agreement by the plaintiff. [*Patteson*, J.—Then do the third and fourth pleas to the residue aver that the debt was one which did not carry interest?] They do not; and it is in contemplation to take out a summons to amend, in order to introduce such an averment in those pleas (*a*). But for the present purpose, it is not necessary to discuss this point; as even if they were demurrable, that would give the plaintiff no right to sign judgment.

PATTESON, J.—I think this rule must be made absolute. If no such agreements have, in fact, been made, I do not see what difficulty the plaintiff has in traversing them. If they have, the defendant is entitled to be let in to plead them.

Rule absolute.

(*a*) This was afterwards done, and the pleas accordingly amended.

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By the London and Blackwall Railway Act, 6 & 7 Wm. 4, c. 123, (local and personal, public) sect. 27, the costs, &c. of a jury to assess compensation are, where the jury find a greater sum by their verdict than that offered by the company, to be borne by the company, and "such costs, charges, and expenses shall be settled and determined by the sheriff," &c., with a power of distress, in case the same shall not be paid within a limited time. By the 37th sect. the costs of deducing title are to be borne by the company; and by sect. 38, in case the parties cannot agree as to the amount of such costs of deducing title, &c., they are to be ascertained by one of the Masters of the Court of Exchequer, and that Court may order their payment accordingly: *Held*, that the Court would not grant a mandamus to the company to pay the costs of an inquiry, and of deducing title to premises injured by the proximity of the railway, where the amount of such costs had not been first ascertained in the mode pointed out by the act.

SAMUEL WALKER being the owner and occupier of a certain tavern and dwelling-house, a part of which was situated within fifty feet of the London and Blackwall Railway, applied to the company to purchase the whole premises, making compensation for good will, &c. The

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company took no notice of this application. Whereupon thirty days having elapsed, he on the 5th of June, 1841, gave them notice under the 6 & 7 Wm. 4, c. 123, (local and personal public,) and the 2 & 3 Vict. c. 95, (local and personal public,) to issue their warrant within twenty-one days for the purpose of causing a jury to be summoned to determine whether he was entitled according to the statutes to have the said tavern and dwelling-house purchased, and compensation made as before demanded, and to assess the sums payable; and he annexed particulars of his claim. This notice being also disregarded, on the 3rd of August, 1841, he issued a precept to the sheriff under the power given by the acts, requiring him to impannel a jury to inquire whether the property in question had been deteriorated in value by the construction of the railway, and to find whether he was entitled to have the property purchased by the company and compensation made, according to his claim; and to assess the amount of purchase money and compensation, and also to inquire, and by their verdict ascertain and determine all such matters and things as they might be lawfully required in the premises. Accordingly the sheriff impannelled a jury and proceeded with the inquiry; but it appearing that only part of the dwelling-house was within fifty feet of the railway; the under-sheriff, who presided, refused to allow the inquiry to proceed, and directed the jury that the claimant was not entitled under the act to have the premises purchased. A rule nisi was obtained in this Court in Michaelmas Term, 1841, for a mandamus to compel him to proceed with the inquiry, which in Michaelmas Term, 1842, was after argument, made absolute (*a*). The sheriff thereupon impannelled a fresh jury on the 27th of March, 1843, and proceeded with the inquiry, when the jury returned a verdict, that the premises were deteriorated in value; and

(*a*) See the case reported, 3 Q. B. 744; S. C. 3 G. & D. 549.

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they assessed the value of the lease and good will at the sum of 2000*l.*; loss by the removal 200*l.*, and the fixtures to be taken at a valuation. The company paid these sums to Walker, but refused on application by Walker to their solicitor to pay the costs and expenses in preparing the necessary evidence to support his claim on the two several inquiries, or to pay the expenses of deducing title to the premises to the satisfaction of the company. It was not stated in the affidavit whether the jury had been required to assess the costs of the inquiries, nor did it appear that the mode pointed out by the act of ascertaining the expenses of deducing title had been followed. The refusal of the company to pay them was not however stated to be founded on either of these grounds.

A rule had been obtained, calling on the company to shew cause why a writ of mandamus should not issue, directed to them, commanding them to pay to Walker, the costs and expenses of the first and second assessment of compensation before the sheriff; and also the costs, charges and expenses, incurred by him in verifying his title to the premises, in respect of which compensation was awarded by the jury.

Hugh Hill shewed cause. There are several objections to this rule. First, there has been no sufficient demand and refusal of payment of these costs, to found an application for a mandamus. In order to make a proper demand, the amount claimed must be a fixed and definite sum. Secondly, the acts (*a*) point out a specific mode by which

(*a*) The material sections are as follow: 6 & 7 Wm. 4, c. cxxiii. s. 27. "That in every case in which the verdict of a jury, summoned as aforesaid, shall be given for the same or a greater sum than shall have been previously offered by the said company for the purchase of any lands to be used or taken by them for the purposes of this act, or as compensation for any damage or loss which may happen or arise in the execution of any of the powers hereby granted, all the costs, charges, and expenses of summoning such jury, and the expenses of witnesses, shall be defrayed by the said company, and such costs, charges, and

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the amount of costs is to be ascertained, and that course has not been taken in the present instance. Thirdly,

expenses shall be settled and determined by the said sheriff, under-sheriff, bailiff, coroner or other person as aforesaid, or by the registrar of the said Court of mayor and aldermen; and in case such costs, charges, and expenses shall not be paid to the party entitled to receive the same within ten days after the same shall have been demanded, then the same shall and may be levied and recovered by distress and sale of any goods and chattels of the said company, under a warrant to be issued for that purpose by any justice of the peace for the county, city, or liberty wherein such inquisition shall be held, not interested in the matter in question, which warrant such justice is hereby authorized and required to issue, under his hand and seal, on application made to him for that purpose by any party entitled to receive such costs, charges, and expenses," &c.

Sect. 37. "That all the costs, charges, and expenses on the part as well of the seller as the purchaser, of all conveyances and assurances of any lands which shall be purchased or taken by the said company for the purposes of this act, and of deducing, evidencing, and verifying such title as the company may require to the said lands, and of making out and furnishing such abstracts and such attested copies as the said company may require, and all expenses whatsoever incident to the investigation, deduction, and verification of such title, shall be exclusively borne and paid by the said company; and the said company, before entering into possession of the lands so purchased or taken, shall pay the amount of such costs, charges, and expenses, or in case there shall be any dispute about the same, shall obtain such order as hereinafter mentioned, and shall deposit, for the purpose of paying the same, in such manner as hereinafter mentioned, the amount of the costs, charges, and expenses claimed by the party or parties from whom the lands shall be purchased or taken: provided always, that the said company shall not be prevented from entering into possession of the lands so purchased by reason of the non-payment of the said costs, charges, and expenses, or by reason of the order hereinbefore mentioned not having been obtained, or the deposit herein mentioned not having been made, unless the party or parties from whom such lands shall have been purchased shall, within seven days after notice in writing for that purpose shall have been given to them by the said company, deliver a bill of their said costs, charges, and expenses to the said company."

Sect. 38. "That if the said company, and the party or parties aforesaid cannot agree as to the amount of such costs, charges, and expenses, the same shall be ascertained by the said Court of Exchequer; and it shall be lawful for the said Court on petition, to

under the terms of these acts, it has been decided that a party in the situation of Walker is not entitled to costs;

be presented by the said company, to order and direct that such costs, charges, and expenses, shall be referred to one of the Masters of the said Court, to be taxed in the usual manner; and such order shall be served on the party or parties aforesaid, who shall be at liberty to proceed under the same; and after taxation of such costs, charges, and expenses, it shall be lawful for the said Court to order and direct that the amount at which the same shall be so taxed, together with the costs, charges, and expenses attending the taxation thereof, or so much of the same as shall be payable by the said company to the person or persons from whom such lands shall have been purchased or taken as hereinafter mentioned, shall be paid to the person or persons aforesaid; and the said money so deposited as aforesaid shall be applied under the direction of the said Court, towards the payment thereof, so far as the same will extend: provided always, that the said company shall not be at liberty to enter into possession of the lands so purchased or taken until an order shall have been made for the taxation of the said costs, charges, and expenses, and the said company shall have deposited the sums claimed in respect of the same in the Bank of England, in the name and with the privity of the accountant general of the said Court of Exchequer, to be placed to his account there ex parte "The Commercial Railway Company," pursuant to the method prescribed by the hereinbefore mentioned act, passed in the first year of the reign of his late Majesty King George the Fourth, which sums shall be applied under the order of the said Court, in payment of the said costs, charges, and expenses: provided always, that the expense of determining such costs, charges, and expenses as aforesaid, and of obtaining the order or orders referring the same to be taxed, shall be paid and borne by the said company, unless one-sixth of the said costs, charges, and expenses, shall be disallowed, in which case the said expense shall be paid and borne by the person or persons for whom the said lands were purchased or taken, and the amount thereof may then be paid to the said company out of the said sum so deposited by them as aforesaid."

2 & 3 Vict. c. 95, s. 18. "That in all cases where the verdict of a jury, summoned as by the said first recited act directed, shall be given for the same, or for a greater sum than shall have been previously offered by the said company for the purchase of any lands to be used or taken by them for the purposes of the said recited acts or this act, or as compensation for any damage or loss which may happen or arise in the execution of any of the powers thereof, the expenses of instructing, and the reasonable fees to

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Corrigall v. *The London and Blackwall Railway Company* (*a*). And fourthly, even were he entitled to these costs, a specific remedy is given for the costs of the inquiry by distress, and for the costs of title by application to the Court of Exchequer; and therefore the Court will not grant a writ of mandamus; *Regina* v. *The Hull and Selby Railway Company* (*b*). The terms of the 6 & 7 Wm. 4, c. 123, s. 27, and 37, under which these costs are sought to be enforced, clearly refer to those cases only in which the premises are taken "for the purposes of the act;" and do not relate to a case like the present where the company are compelled to purchase under sect. 51, of the first act, and sects. 22, 23, of the latter act, in consequence of the premises being deteriorated in value; and where it appears upon the affidavits that the premises were neither "taken, used, nor required for the purposes" of the acts. The 6 & 7 Wm. 4, c. 123, ss. 27 & 38, and the 2 & 3 Vict. c. 95, s. 18, point out the mode in which such costs are to be ascertained; and if the party had any right to make this application, he was at least bound, to first ascertain the costs in the manner pointed out in the acts and make a formal demand of them. But at any rate it is clear that the company are not liable for the costs of the first and abortive inquiry, as that would be to make them liable for the mistake of the sheriff.

Jervis and *Edwin James*, in support of the rule. The

counsel, not exceeding two in number, for attending the inquiry before such jury, and the reasonable expenses of one surveyor, which may have been paid by the party with whom the said company may be in dispute, shall be paid by the said company and the amount of such fees shall be settled and determined by the sheriff, under-sheriff, bailiff, under-bailiff, coroner, or other person presiding at the taking of such inquiry, in like manner as the costs of summoning such jury, and other expenses payable by the said company, but upon the same scale of allowance as may for the time being be adopted or allowed by the taxing officers of her Majesty's Courts of Record at Westminster."

(*a*) 2 Dowl. 851, N. S.; S. C. 6 Scott, N. R. 241; 5 M. & G. 219.

(*b*) 6 Q. B. 70.

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amount of the costs claimed was not in dispute. Therefore it was not necessary to adopt the remedy pointed out by the 27th and 38th section of the former act, and the 18th sect. of the latter. The 38th section of the former act clearly only applies to cases where there is a dispute about the amount of the costs: and not to a case where the only dispute is as to the company's liability to pay them. It cannot be denied that the case of *Corrigall* v. *The London and Blackwall Railway Company*, is against the view here submitted; but the object of the present rule is by putting the answer to the writ of mandamus on the record (*a*), to review the propriety of that decision. The 27th section must be read so as to make the words "previously offered by the company," apply only to the case of lands purchased by the company to be used or taken by them for the purpose of the act; for they have no power to "offer" any sum by way of compensation. [*Patteson*, J.—The section in terms seems not to apply to cases where the company have made no previous offer. *Hugh Hill* referred to the 22nd section of the act as giving a power to offer compensation.] With respect to the costs of title, section 37, uses the term, lands purchased or taken "for the purposes of the act" not for the purposes of the railway; and they would not take in their corporate capacity, except for the purposes of the act. There was no objection made as to the amount not being ascertained. The only question was as to the company's liability. The 27th section only applies to cases where the company does not dispute its liability but the amount claimed. We are obliged to come to the Court to get these costs. The 37th section applies equally to cases where the company does not take the initiative.

PATTESON, J.—Independently of the case in the Common Pleas, there is a difficulty which weighs with me in

(*a*) Under the 6 & 7 Vict. c. 67, s. 1.

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this case. The sheriff, in taxing the costs of the inquiry, under the 27th section of the 6 & 7 Wm. 4, c. 123, is not bound to hear both sides, but may proceed ex parte. Can then a party come here without having first applied to the sheriff to ascertain the amount of the costs in the mode pointed out in the act of Parliament? It does not appear upon the affidavits indeed that this objection was raised by the company; but Mr. Hill has relied upon it in his argument, and I cannot exclude it from consideration. It seems to me that the proper course is to go to the sheriff and get him to tax the costs of the inquiry, for until that is done I cannot interfere. With respect also to the costs of deducing title, this is not the proper mode of enforcing their payment; for supposing a peremptory mandamus were to go, directing the company to pay them, who is to ascertain their amount? Not the Master of this Court, for the act says they shall be ascertained by one of the Masters of the Court of Exchequer. If, after the amount of these costs has been ascertained the company refuse to pay them, there is still the remedy pointed out by the act of proceeding by distress. If these means should fail, it will be then time enough for this Court to grant a mandamus. It seems to me, therefore, that the application for a mandamus is at present premature, and that the rule must, consequently, be discharged.

Rule discharged.

COURT OF COMMON PLEAS.

Michaelmas Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

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TEMPEST and Another *v.* KILNER. 1845.

Assumpsit for not delivering within a reasonable time certain railway shares. The plaintiffs averred that they had been "always from the said time of making the said agreement and promise, ready and willing to accept the transfer of the said interest and shares." The defendant pleaded "that the plaintiffs were not always from the time of making of the said agreement and promise in the declaration mentioned, ready and willing to accept the transfer of the said interest and shares:" *Held*, that the plea was too large a traverse, and, therefore, bad.

ASSUMPSIT. The declaration stated, that heretofore, to wit, &c., the plaintiffs, at the request of the defendant, bargained and agreed to buy of the defendant, and the defendant then bargained and agreed to sell to the plaintiffs a certain interest or share of him the defendant in a certain company or partnership undertaking for constructing a railway from the parish of Ashton under Lyne, near Manchester, in the county of Lancaster, to the parish of Kirkleton, near Huddersfield, in the county of York, to wit, one hundred shares in the said company or partnership undertaking, at a certain price in that behalf, to wit, fifteen shillings premium for each and every share, in addition to such sum or sums as, at the time of the transfer by the defendant to the plaintiffs, should have been paid to the said company or partnership in respect of the said shares, and each of them; and thereupon to wit, on the day and in the year last aforesaid, in consideration thereof, and that the plaintiffs, at the request of the defendant, then promised the defendant to accept within a reasonable time a transfer of the said interest or shares, and to pay for the same, at the

5 Dowl. 357.

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rate or price aforesaid, the defendant then promised the plaintiffs within a reasonable time to transfer the said interest or shares to them the plaintiffs. And although a reasonable time for the said transfer of the said interest or shares had long elapsed before the commencement of this suit, and the defendant, long before the commencement of this suit, and after a reasonable time from the making of the said agreement and promise had elapsed, could, and might, and ought to have transferred the same to the plaintiffs, upon payment of the price thereof, after the rate aforesaid; and although the plaintiffs have always, from the said time of the making of the said agreement and promise, been ready and willing to accept the transfer of the said interest and shares of him the defendant, and to pay for the same at and after the rate in that behalf aforesaid, whereof the defendant, during all the time aforesaid, had notice; and although the plaintiffs, after the lapse of a reasonable time for the transfer of the said interest or shares of the defendant, to wit, on the 1st day of November, A. D. 1844, requested the said defendant to transfer the said interest or shares to them the plaintiffs, and then tendered and offered to pay for the same at and after the rate in that behalf aforesaid: yet the defendant, not regarding his promise, did not nor would, when so requested as aforesaid, and hath not hitherto transferred to the said plaintiffs the said interest or shares of him the defendant in the said company or partnership undertaking, but hath neglected and refused so to do, by reason whereof the plaintiffs have lost divers great gains and profits which might and otherwise would have accrued to them from the transfer of the said interest or shares to them as aforesaid, to the damage of the plaintiffs, &c.

The defendant pleaded, secondly, that the plaintiffs were not always, from the time of the making the said agreement and promise in the declaration mentioned, ready and willing to accept the transfer of the said interest and shares of him the defendant, and to pay for the same at

and after the rate in the declaration in that behalf mentioned, in manner and form as in the declaration is in that behalf alleged.

Demurrer; the plaintiffs' point marked for argument was, that the traverse tendered by the second plea was too large. Joinder in Demurrer.

Byles, Serjt., in support of the demurrer. The defendant by his plea has taken too large a traverse. The contract disclosed in the declaration is that the defendant should transfer the shares within a reasonable time. It was therefore the duty of the plaintiffs to be ready to accept them within a reasonable time. He was not bound to accept them afterwards. But if issue were joined upon the traverse taken by this plea the defendant would succeed by shewing that the plaintiffs would not accept after the lapse of a reasonable time before action brought. The mere averment by the plaintiffs that they were always ready and willing to accept the transfer, did not justify the defendant in traversing that averment in those general terms. The plaintiffs' averment was the allegation of an interval of time; and that being divisible, that portion only of it should be traversed which was material. In *Stephen on Pleading*, 244, *3rd ed.* the rule was stated to be "as a traverse must not be taken on an immaterial allegation, so, when applied to an allegation that is material, it ought in general to take in no more and no less of that allegation than is material. If it involves more, it is said to be too large." That rule which was a very old one had been lately recognised in *Basan* v. *Arnold* (*a*). That was an action on a bill of exchange, and the replication in answer to a plea denying that the plaintiff was still the holder of the bill alleged that he was at the commencement of the suit and "still is" the holder of the bill. The Court there held the traverse too large as it put in issue the plaintiffs being the holder of the bill not only at the time of

(*a*) 6 M. & W. 559; S. C. 8 Dowl. 356.

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the commencement of the suit, but also at the time of the plea pleaded. Yet there, the defendant in his plea had alleged, that before the commencement of the suit he was and "still is," liable to a person to the defendant unknown. *Thurman* v. *Wild* (*a*), enforced the same principle. So also, in *Jackson* v. *Allaway* (*b*), the plaintiff having in a declaration on a breach of an agreement for the purchase of certain iron mine, unnecessarily alleged a tender and offer to sell and deliver the stipulated quantities, the defendant's plea denying the tender and offer was held bad. These cases were authorities to shew that the defendant by his form of traverse, had raised too wide an issue.

Manning, Serjt., contrà. The averment that the plaintiffs were ready and willing to accept the transfer was indivisible. If therefore, the plaintiffs alleged it in terms too extensive, the defendant had a right to take issue upon the allegation in that form. In *Bristow* v. *Wright* (*c*), where the question was as to the sufficiency of proof in support of an unnecessary allegation in the declaration, Lord *Mansfield* in delivering judgment said, "It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But, since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage, (which might have been struck out on motion,) and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the Master on a reference to him, would strike out, (irrelevant covenants for instance,) *that* will be rejected by the Court, and need not be proved. But, if the very ground of the action is misstated, as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited,

(*a*) 11 A. & E. 453; S. C. 3 P. & D. 289.
(*b*) *Ante*, vol. 1, p. 919; S. C. 7 Scott, N. R. 875; 6 M. & G. 942.
(*c*) 2 Doug. 667.

that will be fatal. For then, the case declared on is different from that which is proved, and you must recover secundum allegata et probata." The defendant was not bound to carve out of the plaintiff's declaration what might be just sufficient to sustain the action. If the averment in the plea was construed in the same manner as the same averment in the declaration, the plea would be quite unobjectionable. But the declaration was bad as the interest or shares mentioned in the declaration could not be legally transferred. The interest stated to have been here contracted for, was a share in a partnership, and therefore in the nature of a chose in action, and not legally transferrable. [*Maule*, J.—It is not so assignable as to enable a party to sue in his own name as assignee, but such an assignment is not alleged. *Tindal*, C. J.—Does it lie in your mouth to say that these shares are not assignable? All that the plaintiffs seek is to obtain the equitable right, and that the defendant bargains to assign to them.]

Byles, Serjt., in reply was stopped by the Court.

TINDAL, C. J.—I am of opinion that the judgment of the Court in this action should be for the plaintiffs. The allegation made by the plaintiffs, that they have always, from the time of the making of the agreement, been ready and willing to accept the transfer of the shares of the defendant, and to pay for the same, is clearly a divisible allegation; and being so, the defendant was bound to traverse that part of it which it would have been sufficient for the plaintiffs to have alleged. He has, however, traversed the whole; the plea is, therefore, bad, upon the ground that it traverses more than is material, and is, therefore, too large.

COLTMAN, J., concurred.

MAULE, J.—An allegation of time, when stated as a fact, is clearly divisible; if so, as the plea traverses more

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than it was material for the plaintiffs to allege as to the time during which they were ready and willing to accept the transfer of those shares, the traverse is too large.

ERLE, J., concurred.

Judgment for the Plaintiffs.

6C. 2 CB. 309

GILLAN *v.* DEARE.

A plea of discharge under 5 & 6 Vict. c. 116, s. 10, ought to shew that the final order was for "distribution" as well as protection. *Erle*, J., dissentiente.

But *semble*, that if it disclosed a compliance with the provisions of sect. 4, it would be sufficient.

The plea should conclude with a verification.

6 DGL. 150. 6 — — 2

ASSUMPSIT on a bill of exchange by the indorsee against the acceptor.

The defendant pleaded, that after the acceptance of the said bill of exchange in the declaration mentioned, and after the same had become due and payable, and before the commencement of this suit, to wit, on, &c., the defendant not being a trader within the meaning of the statutes in force relating to bankrupts at the time of making and passing the act of Parliament hereinafter mentioned, and having resided twelve calendar months within the district of Birmingham, under and by virtue of and according to the directions and provisions of a certain statute made and passed in the sixth year of the reign of our Lady the now Queen, entitled, "An Act for the relief of Insolvent Debtors," duly presented his petition for protection from process to the Court of Bankruptcy for the Birmingham district, in the county of Warwick, which said petition was forthwith afterwards, to wit, on the day and year aforesaid filed of record in the said Court of Bankruptcy. And the defendant further says, that such proceedings were had in the said district Court of Bankruptcy upon the said petition of the defendant, that afterwards, and before the commencement of this suit, to wit, on &c., a final order was made by Robert Daniell, Esq., one of the commissioners of the said district Court of Bankruptcy, duly authorized in that behalf, for the protection of the person of the defendant from process, and for the vesting of the estate and effects of the

defendant in Thomas Bittleston, one of the official assignees of the said district Court of Bankruptcy; and the defendant further says, that no assignee was appointed by the creditors of the defendant, or by any of them; whereby and by force and virtue of which said order the defendant was discharged of and from the said bill of exchange and cause of action in the said declaration mentioned; and the defendant further says, that the said order and discharge still remain in full force. Verification.

Special demurrer, assigning for causes, that the plea ought to have stated what the proceedings were, which were had upon the said petition, and have shewn that they were such as were authorized by the said statute, and as entitled the said commissioners to make the said final order; and also for that the said plea, if intended for a general plea, given by the said statute is not sufficient, inasmuch as it does not state or shew that the petition so presented was such a petition, or that it had annexed to it such schedule as the said statute requires; nor does it follow the language of the statute in that behalf; and also that it does not conclude to the country.

Talfourd, Serjt., (*Lush* with him) in support of the demurrer. The question raised by the demurrer was whether the defendant by his plea had sufficiently complied with the provisions of 5 & 6 Vict. c. 116, s. 10. By that section it was provided "that if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." It would be observed, in the present case, that the plea did not allege that the order had been made by the commissioner for "distribution;" it therefore did not strictly comply with the provisions of sec. 10. Then

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if it sought to protect the defendant by the operation of the provisions contained in sect. 4, it was requisite that it should show what the proceedings were, which were taken before the commissioner. In *Leaf* v. *Robson* (*a*), the same question was raised before the Court of Exchequer, and the Court there held that a plea framed similarly to the present was bad, as neither strictly pursuing the form given by sect. 10, nor disclosing the requisites of sect. 4. There *Parke*, B., said "if you rely on the tenth section you must follow the very words of it." In *Cook* v. *Henson* (*b*), this Court held the plea sufficient, although it pleaded the defendant's discharge generally, without setting forth particularly the proceedings which had been taken in the Court of Bankruptcy. But there, the plea stated the order to have been for "distribution" as well as for protection. The 10th section if available in the present case must have relation to the proceedings which took place under sect. 4, and under that section, the order must be to vest the estate of the insolvent in the official as well as the creditors' assignee. Here, however, it appeared that no creditors' assignee had been chosen. That shewed that the order here made was not one to which section 10 applied. This Court in *Nichols* v. *Payne* (*c*), intimated an opinion that the final order under this statute ought to be shewn by the plea to have been for distribution as well as for protection. Then as to the conclusion of the plea which was with a verification. That conclusion was wrong, as the plea should have concluded to the country. It was analogous to the general plea given by the 6 Geo. 4, c. 16, s. 126, and that had been held properly to conclude to the country; *Sheen* v. *Garrett* (*d*).

Channell, Serjt., in support of the plea. The object of the statute was to enable a defendant, whose property had been vested in another, to protect himself from an action.

(*a*) 13 M. & W. 651; S. C. *ante*, vol. 2, p. 646.
(*b*) *Ante*, p. 177.
(*c*) *Ante*, vol. 2, p. 629; S. C. 8 Scott, N. R. 732; 7 M. & G. 927.
(*d*) 6 Bing. 686; S. C. 4 M. & P. 525.

If therefore, the plea shewed the estate of the defendant, to have been vested by a final order in the assignee for the purpose of distribution, it was good in substance. The plea in the present case did disclose such an order. But then it was said, that the present case did not come within the 10th section, because the final order made did not appear to be such an order as was contemplated by sect. 4, as it did not vest the estate of the defendant in the creditors' as well as the official assignee. If such an objection as this were allowed to prevail, it would be a great hardship on insolvents, as creditors might, by abstaining from choosing an assignee, prevent an insolvent from obtaining a sufficient final order to afford the protection intended by section 10. The right to choose an assignee was a privilege conferred upon the creditors, which they had a right to avoid exercising, but they ought not to be allowed to exercise such a discretion to the prejudice of the insolvent. If then an order made for vesting the insolvent's estate in the official assignee were sufficient within the meaning of sect. 4, it must be a sufficient order within the meaning of sect. 10; because such an order must necessarily be an order for distribution. The plea, therefore, in setting out the facts which appeared on the face of it, disclosed what in point of legal effect was a protection under sect. 10. With regard to the objection, that the plea concluded with a verification instead of to the country, that could not be sustained; inasmuch as it disclosed new matter, and therefore, according to the ordinary rules of pleading, it ought to conclude with a verification. The case on the 6 Geo. 4, c. 16, s. 126, was inapplicable, as there, the Court appeared to hold that the plea under that statute was in effect a statutory general issue. If so, it would properly conclude to the country.

Talfourd, Serjt., replied.

TINDAL, C. J.:—It appears to me that as the special demurrer points out for cause that the provisions of

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sect. 10 have not been complied with, this plea is bad. It cannot be said to be a plea under sect. 4, for if it were, it should have stated all the facts, such as the appearance of the insolvent before the commissioner, and what was afterwards done. Therefore, as it is not a plea under sect. 4, it must be taken as a plea under sect. 10. It is provided by that section, "that if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorised." Now, all that the plea here states is, that a petition was duly presented, and that a final order was made by a commissioner duly authorised for the protection of the person of the defendant from process, and for the vesting of the estate and effects of the defendant in the official assignee, but that no creditors applied to choose an assignee on their behalf. It appears to me, that he is not at liberty to avail himself of this short form given by the statute unless he strictly follow the words of the section. He must take it for better or for worse. Perhaps it may be said that it sufficiently appears on the plea that the property of the insolvent was vested in the official assignee for the purpose of distribution; but the defendant having adopted the form given by the statute, he was bound to pursue it strictly.

COLTMAN, J.—I agree entirely with my Lord Chief Justice. I think the plea is bad, for not disclosing upon the face of it sufficient to constitute a good final order. I do not mean to say that by proper averments the facts stated in this plea might not make it a good one; as, if it were shewn that the non-appointment of a creditors' assignee arose from the default of the creditors themselves. Here, however, no such averment is introduced; the plea consequently cannot be considered as even a substantial

compliance with the provisions of sect. 10. The section gives the defendant only a conditional power to plead generally; in order, therefore, to enable him so to plead, he must strictly comply with the terms of the section.

MAULE, J.—I entertain a great deal of doubt on the question, and should have wished more time to be taken to consider it. No doubt, the words of sect. 10 have not been followed, and there may be a question whether the words used in this plea, although they are the words of sect. 4, referring to the vesting of the estate and effects of the insolvent in the assignee, are sufficient to shew a good final order under sect. 4. If they were, it would not be, in my opinion, necessary to follow the words of sect. 10, and shew the order to have been made for distribution. But I don't think the plea discloses sufficient facts to shew a compliance with the provisions of sect. 4; if it did, I don't think it would be necessary that the word "distribution" need be introduced, although found in sect. 10. But supposing it to be a plea under sect. 10, the words perhaps are not sufficient. If the plea had set out the order itself, the Court might have seen whether it was such a one as the statute required. On the first point, therefore, although with considerable doubt, I agree with my Lord, and my Brother *Coltman*. Then, as to the second objection, that the plea should have concluded to the country, I think that it properly concludes with a verification. It does not come within the reason of the 6 Geo. 4, c. 16, s. 126. The Legislature in passing that act might have permitted the defendant to plead the general issue, and give the bankruptcy in evidence under it. Though the Legislature did not go so far as that, it went part of the way, and meant to express its intention that the defendant should have the same benefit from his plea of bankruptcy as if it had been available under the general issue. The language of sect. 10, however, of this statute is different, for it does not enable the defendant to plead his bankruptcy "in general," but

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provides, that "it shall be a sufficient plea in bar of the suit." This, therefore, does not appear to be within the principle of the anomalous case of bankruptcy.

ERLE, J.—I regret to differ from the rest of the Court upon the first point. It appears to me that this statute was passed for the relief of honest insolvent debtors. The mode by which this relief is to be afforded is by applying to the commissioner on petition, and giving up all his property. He may then obtain a final vesting order, which will be a protection to him, and if any action is brought against him for a debt previously due, he may plead that order generally. The statute gives a general direction as to the main requisites of the plea. They are to be found in section 10. No particular form is given, but the requisites are generally described. To this plea, there are three objections. The first is that it ought to have concluded to the country instead of with a verification. It seems to me that there is no ground for taking this plea out of the general rule; that where new facts are pleaded, the plea should conclude with a verification. The plea of bankruptcy is an anomaly, and affords no analogy to the present case. Secondly, it is objected, that by a "vesting order," the statute contemplated a vesting order which should vest the effects of the insolvent in the official and creditors' assignee, and that as the plea does not shew that the creditors appointed an assignee, the defendant is not entitled to the benefit of the statute. It seems to me, however, that the plea, notwithstanding this objection, is good. The course is for the commissioner to examine the insolvent, and if he be of opinion, on such examination, that the insolvent is entitled to an order, he is to appoint a certain day for the purpose of making a final order, unless cause be shewn to the contrary. That order is for the protection of the insolvent, and also to vest his effects in the official assignee as well as an assignee to be chosen by the creditors. It seems to me that the provision enabling the creditors to

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attend, gives them an option so to do, as well as to choose an assignee. That part of the provision then being for their benefit, they may, if they think proper, waive it according to a well-known rule of law; and it seems to me that the insolvent ought not to be injured by their not attending, and not choosing any assignees. It appears therefore to me that the plea alleging the creditors not to have appointed an assignee was sufficient. The third point is one on which I have paused long, as to whether in following sect. 10, it was necessary that the word "distribution" ought to be introduced. I think that by not introducing it, the pleader has taken a more correct view than by introducing such an allegation. By sect. 10, it is provided, that the defendant shall be at liberty to plead his final order for protection, and that clearly refers to the final order described in sect. 4. In sect. 4, a provision is made for an order to vest the estate in the assignees, but not a word is to be found there about distribution. The duty, after the effects become vested in the assignees, is cast upon them to distribute. The pleader has here alleged the two main requisites to constitute a valid final order, in stating it to be for the protection of his person, and vesting his property in the assignee. In so doing he has set it out according to its legal effect, and as there is no express form given by the statute, I think he has alleged enough to constitute this a good plea.

Leave to amend on the usual terms.

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S C. 2 C B. 288.

SMITH *v.* NESBITT.

Judgment for the plaintiff on demurrer having been signed in an action of covenant against the defendant as sequestrator, who was bound to pay over to the plaintiff all such sums as should be received by him in his character as sequestrator, in satisfaction of a debt owing to the plaintiff, the Court refused to refer it to the Master to compute the amount of damages to which the plaintiff was entitled.

CHANNELL, Serjt., moved for a rule nisi to refer it to the Master to compute the amount of damages due on a covenant in an action against the defendant, for not paying over certain sums received by him as a sequestrator. The declaration stated, that by an indenture made between one H. Nesbitt of the first part, the defendant of the second part, and the plaintiff of the third part, after reciting that a writ of sequestrari facias had issued against the ecclesiastical goods and benefice of the Rev. C. W. to recover a judgment debt of 1,500*l.* due to the defendant; and after reciting that the said judgment debt had become the property of the said H. Nesbitt, and that the said H. Nesbitt was indebted to the plaintiff in 300*l.*, the defendant thereby covenanted with the plaintiff that he, the defendant, should and would pay over the first fruits, or proceeds which should be first realized, and be at the disposition of the defendaut under the said sequestration, or on account of the said judgment debt, forthwith, upon the receipt thereof, to the plaintiff, in part or full satisfaction, as the case might be, of the said sum of 300*l.* The declaration then stated that although divers monies, amounting, &c., being first fruits and proceeds were realized, and were at the disposition of the defendant under the said sequestration; yet that the defendant had not paid over the said monies or any part thereof. The Court gave judgment on demurrer for the plaintiff; and it was now sought to refer it to the Master to compute the amount of damages, instead of executing a writ of inquiry. A rule nisi having been granted,

Byles, Serjt., shewed cause. The cases in which the Court was in the habit of referring questions to the Master to compute, were those in which a mere matter of calculation was involved; 1 *Tidd's Practice*, 571, *9th ed.*;

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2 *Chitt. Archb. Pract.*, 709, 7*th ed.* Where any thing more than mere calculation was required in order to ascertain the amount of the plaintiff's claim, a writ of inquiry was required to be executed; *Messin* v. *Massareene* (*a*); *Cooke* v. *Pettit* (*b*); *Denison* v. *Mair* (*c*); *Nelson* v. *Sheridan* (*d*). Now here it could not be said that to determine the amount of the plaintiff's claim was a mere matter of computation. The demurrer did not necessarily admit that the whole sum for which the covenant was given had been received. If, therefore, the case was referred to the Master, the whole account of receipts and reductions, which might properly be made, must be brought before him in order to determine the correct balance. Difficult questions might arise upon those measures which would be much more properly determined by a jury under the direction of a Judge. The present rule, therefore, ought to be discharged.

Channell, Serjt., in support of the rule. It was a matter of discretion in the Court in what cases it would direct a question as to the amount of damages to be determined by the Master instead of a jury. It certainly could not be contended that a certain sum was admitted to be due under this covenant to the plaintiff, and perhaps it was difficult to distinguish the present in point of principle from those in which the Court had declined interfering by a reference to the Master.

TINDAL, C. J.—I think this case involves more than a matter of simple computation. The rule must therefore be discharged.

Rule discharged.

(*a*) 4 T. R. 493.
(*b*) 2 Wils. 5.
(*c*) 14 East, 622.
(*d*) 8 T. R. 395.

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Sc. 2. C/3. 320.

NEALE *v.* SNOULTEN.

An affidavit of debt, where the sum sworn to consists partly of interest, must shew either that the sum is due on a contract for payment of interest, or that a sum of 20*l.* is due, independent of the claim of interest.

The proceeding by capias in pursuance of a Judge's order under the 1 & 2 Vict. c. 110, is collateral to the cause; and therefore, although the defendant is arrested, and continues in custody, the plaintiff may enter an appearance for him, file his declaration, and serve notice thereof, in the same manner as if no arrest had taken place.

DOWLING, Serjt., moved for a rule to shew cause why the defendant should not be discharged out of custody, on the ground of a defect in the affidavit to hold to bail, on which the defendant had been arrested in pursuance of an order of *Platt*, B. The affidavit was in these terms: —"The defendant is justly and truly indebted to this deponent in the sum of 105*l.* 8*s.* 4*d.*, on a bill of exchange drawn by this deponent upon and accepted by the said defendant for the payment of 80*l.* at a day now past; and also for money lent, laid out, and expended for the said defendant at his request; and for interest upon, and for the forbearance to the said defendant by this deponent, at the said defendant's request, of monies due and owing from the said defendant to this deponent." It was consistent with the terms of this affidavit that a less sum than 20*l.* was due from the defendant to the deponent, independent of the claim to interest. According to the terms of this affidavit interest could only be due by way of damages, and in respect of interest, as damages, a defendant could not be arrested. He cited *Drake* v. *Harding* (*a*), and *Callum* v. *Leeson* (*b*), *Latreille* v. *Hoepfner* (*c*). A rule nisi having been granted,

Channell, Serjt., shewed cause. It was not necessary, in order to justify the arrest of the defendant, that an express contract for the payment of interest should be disclosed, on the face of the affidavit, if such a contract could be inferred from the terms of the affidavit. He cited *Pickman* v. *Collis* (*d*), and *White* v. *Sowerby* (*e*). A defendant was as liable to be arrested in respect of a claim for interest, as in respect of a debt.

(*a*) 4 Dowl. 34.
(*b*) 2 Dowl. 381; S. C. 2 Cr. & M. 406.
(*c*) 10 Bing. 334; S. C. 3 M. & Scott, 800; 2 Dowl. 758.
(*d*) 3 Dowl. 429.
(*e*) Ibid. 584.

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Dowling, Serjt., was not called upon.

MAULE, J.—It would be consistent with the terms of this affidavit that the interest was due on other grounds than on that of a contract. It might be claimed in consequence of a notice having been given in pursuance of the 3 & 4 Wm. 4, c. 42, when it would be for the jury to assess the amount at the trial. If so, then the person making this affidavit could never be indicted for perjury.

TINDAL, C. J.—The current of authorities on this subject seems to shew that either the deponent should disclose a contract for the payment of interest, or state a debt to the adequate amount exclusive of the claim to interest. Neither has been done by the deponent in the present case.

Rule absolute.

Dowling, Serjt., afterwards obtained a rule nisi to set aside the notice of declaration which had been served upon the defendant while he was in custody, in pursuance of the capias which had issued on the authority of the Judge's order to hold to bail. The objection was, that, as the defendant was a prisoner, the declaration should have been delivered and not filed.

Channell, Serjt., shewed cause. The present action was commenced by a writ of summons, in conformity with the provisions of the 1 & 2 Vict. c. 110, sect. 2, and the defendant not appearing within the eight days an appearance was entered for him, and then, according to the practice of the Court, the declaration was filed and notice served upon the defendant. The proceeding therefore, on the part of the plaintiff, was perfectly regular. The fact of the defendant being arrested in pursuance of a Judge's order, could not render it necessary to alter the mode

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of proceeding. The arrest of the defendant was quite collateral to the cause, and therefore the plaintiff was correct in taking the same steps as if the defendant had not been arrested. The case might have been different antecedent to the 1 & 2 Vict. c. 110, when the capias was the commencement of the suit; but now that the summons was the commencement of the suit, the capias was merely collateral.

Dowling, Serjt., in support of the rule. When a defendant has been arrested on a capias issued in pursuance of a Judge's order, he is in the same situation as if the suit had been commenced by writ of capias under the old practice, and consequently, being a prisoner, the declaration ought to be delivered and not filed. If not, the defendant would be placed in the same difficulty which it was the object of the old practice to obviate; that is, the defendant, while a prisoner, would receive notice of a declaration being filed, when he, from being in custody, could not obtain it from the office where it was filed. The case of *Ball* v. *Stanley* (*a*) was no authority to shew that the proceeding by capias, in pursuance of a Judge's order, was to alter the nature of the action from one commenced by serviceable process to one commenced by writ of summons. There it was agreed between the parties that on certain terms "all further proceedings in the cause should be stayed." The plaintiff, notwithstanding this arrangement, obtained an order to arrest the defendant. An application was made to rescind that order, and on that occasion, *Alderson*, B., said, "This is a proceeding in the cause; it changes the nature of the cause from one commenced by a writ of summons to one founded on a writ of capias. Though not a necessary proceeding to accelerate or retard final judgment, it is yet a proceeding whereby the nature of the cause is changed."

(*a*) 6 M. & W. 396; S. C. 8 Dowl. 344.

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TINDAL, C. J.—No authority has been cited to shew that if in the progress of an action commenced by a writ of summons a writ of capias is obtained, the suit so commenced is altered in its character. It seems to me, therefore, that as an appearance was entered for the defendant, the plaintiff was entitled, in conformity with the practice, to file a declaration, and serve the defendant with notice. The arrest, in pursuance of the Judge's order, was merely collateral, and could not alter the usual mode of procedure.

COLTMAN, J.—The old practice respecting prisoners is inapplicable to the present case. There the defendant remained in custody in default of obtaining bail for his appearance. The plaintiff consequently could not enter an appearance for him, and therefore could not file a declaration and serve him with notice. Here, however, the plaintiff has entered an appearance for the defendant, and was consequently regular in the course he has pursued.

ERLE, J., concurred.

Rule discharged.

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5 C. 2 CB. 367.

HINTON *v.* ACRAMAN.

Declaration on a bond under 1 & 2 Vict. c. 110, s. 8, given by the defendant and others, his partners in trade, stated that judgment was recovered in an action for the original debt, which was not paid; and that a Judge's order was made to render the principals within ten days, which time was enlarged without prejudice by another Judge's order; that a rule nisi was obtained within that period, calling on the plaintiff to shew cause on a subsequent day why the defendant and his bail should not have further time to render, and that in the meantime

DEBT. The declaration stated, that whereas the defendant on the 9th day of April, A. D. 1842, by his certain writing obligatory, sealed with his seal, became and was held and firmly bound unto the plaintiff in the sum of 2700*l.*, &c. above demanded to be paid by the defendant to the plaintiff when the defendant should be thereunto afterwards requested, which writing obligatory was and is subject to a certain condition thereunder written; whereby, after reciting that the plaintiff had, under the provisions of a statute made and passed in the 1st and 2nd years of the reign of her present Majesty Queen Victoria, filed an affidavit in her Majesty's Court of Bankruptcy to the effect, that a certain debt amounting to the sum of 1650*l.* was justly due to him from the defendant, and Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, and that the defendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan were, as he the plaintiff verily believed, traders within the meaning of the laws then in force concerning bankrupts, and also reciting that the plaintiff had, on the 23rd day of March, in the year aforesaid, caused each of them, the defendant and the said Alfred John Acraman respectively to be personally served with a copy of such affidavit, and with notice in writing requiring immediate payment of such alleged debt

proceedings against the defendant and his bail should be stayed; and that neither the defendant nor his co-debtors rendered themselves according to the practice of the Court, or within the time mentioned in either of the orders, or within any other time, or in any manner directed by the Court or any Judge thereof: *Held*, first, that a plea which alleged that no writ of ca. sa. had issued in the original action was good. Secondly, that a plea which averred that the Judge's order had been obtained ex parte by the plaintiff, was bad. Thirdly, that a plea which alleged that the rule nisi in the declaration alleged was made absolute on the twenty-second day of Term, giving further time to render, and that a render was made within that time, was good. Fourthly, that a bond under 1 & 2 Vict. c. 110, s. 8, under such circumstances, was not a claim within the 6 Geo. 4, c. 16, ss. 51 and 56, barred by the defendant's certificate obtained after the commencement of the original action, but before judgment. Fifthly, that a plea alleging that the plaintiff had brought an action to recover the sum mentioned in the bond at the time of giving the bond, was not a bar to an action on the bond, although the judgment in respect of the debt was obtained in an action subsequently commenced.

4 DL. 212

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of 1650*l.*, and the bankers' commission and interest due thereon, and that the plaintiff had also on the 24th day of March in the year aforesaid, caused the said William Morgan to be personally served with a copy of such affidavit, and with a like notice, and also reciting that James Oxley Bridges and Joseph Arthur Ballantine had agreed to join the defendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan in the said writing obligatory, subject to the condition for making the same void, &c. as sureties for the defendant and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan; the condition of the said writing obligatory was declared to be that if the defendant and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, James Oxley Bridges and Joseph Arthur Ballantine, or any, or either of them, their, or his heirs, executors, or administrators, should well and truly pay, or cause to be paid to the plaintiff, his executors, administrators, or assigns such sum or sums as should be recovered in any action or actions which then had been, or thereafter should be brought for the recovery of the said alleged debt, together with such costs as should be given in the same, or if the defendant and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan should render themselves to the custody of the gaoler of the Court in which such action or actions had been had, or might be brought according to the practice of such Court or Courts, or within such time and such manner as the said Court or Courts, or any Judge thereof respectively should direct, after judgment should have been recovered in such action or actions, then the said writing obligatory to be void and of no effect, otherwise to be and remain in full force and virtue, as, &c. That afterwards, and after the making of the writing obligatory and condition, to wit, on the 15th day of July, in the year aforesaid, a certain action was com-

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menced by the plaintiff against the defendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, in her Majesty's Court of Exchequer at Westminster, for the recovery of the said debt in the said condition mentioned, together with such costs of the plaintiff as should be given in the same. The declaration then alleged that such proceedings were had, that the plaintiff recovered judgment thereon against the defendant, and Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, for 1698*l.* 5*s.* And that the sum of 1650*l.* parcel of the said sum of 1698*l.* 5*s.* so recovered as aforesaid was and is the debt, in the said condition mentioned, and was and is, together with the sum of 33*l.* 11*s.* 6*d.* interest upon the said sum of 1650*l.*, the amount which in and by the said last mentioned Court was adjudged to the plaintiff for his damages by him sustained on occasion of the not performing of the said promise, and that the sum of 14*l.* 13*s.* 6*d.* residue of the said sum of 1698*l.* 5*s.* was the amount of damages adjudged to the plaintiff, in and by the last mentioned Court, for his costs and charges by him about his suit in that behalf expended; of all which several premises the defendant before the commencement of this suit, to wit, on, &c., had notice. And the plaintiff further saith that the defendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan did not, nor did any or either of their heirs, executors, or administrators, nor did the said James Oxley Bridges and Joseph Arthur Ballantine, or either of them, their, or any, or either of their heirs, executors or administrators at any time before the commencement of this suit, pay or cause to be paid to the plaintiff the said sum of 1698*l.* 5*s.* so recovered as aforesaid, or any part thereof, according to the form and effect of the condition of the said writing obligatory. And that after the recovery of the said judgment in the said action by and at the suit of the plaintiff against the de-

fendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan in the said Court of Exchequer, to wit, on the 19th day of August, 1842, a certain order was duly made in the last mentioned cause, on the application of the plaintiff by the Honourable Sir *John Taylor Coleridge*, Knt., one of the Justices of the Court of Queen's Bench, by which order the said Sir *John Taylor Coleridge*, so being such Justice as aforesaid, ordered that the defendant and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, should surrender themselves to the custody of the Marshal of the Queen's prison, within ten days after service of a copy of that order on the defendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, and on the said James Oxley Bridges and Joseph Arthur Ballantine; a copy of which order of the said Sir *John Taylor Coleridge*, so being such justice as aforesaid was afterwards, to wit, on the 20th day of August, 1842, duly served on the defendant and the said Alfred John Acraman, Thomas Holroyd, and William Morgan, and the said James Oxley Bridges, and Joseph Arthur Ballantine, and a copy of which order was afterwards, to wit, on the 23rd day of August, 1842, duly served on the said Daniel Wade Acraman. And that ten days after service of a copy of the said order on the defendant and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, and the said James Oxley Bridges, and Joseph Arthur Ballantine, had before the commencement of this suit long elapsed. And the plaintiff further saith, that afterwards and after the recovery of the said judgment, to wit, &c., the Honourable Sir *Cresswell Cresswell*, Knt., one of the Justices of the Court of Common Pleas at Westminster, did make a certain order in the said last mentioned cause by which last mentioned order the said Sir *Cresswell Cresswell*, so being such justice as aforesaid, did order that the time for the defendant and

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the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, to render in that cause should be enlarged for a week, and that the further hearing of a certain summons to set aside the said order of the Honourable Mr. Justice *Coleridge* for the defendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan to render, should be adjourned until the second day of Sept. A. D., 1842. And the plaintiff further saith, that on the 2nd of Sept., A. D., 1842, a certain other order was made in the last mentioned action by the said Sir *Cresswell Cresswell*, so being such Justice as aforesaid, by which last mentioned order the said Sir *Cresswell Cresswell* did order that the time for surrendering the defendant and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan should be enlarged, until the fifth day of the then next Michaelmas Term, without prejudice to the right of the bondsmen to render the defendant, and the said William Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan in the meantime, or to the right of the said plaintiff to treat the bond as forfeited. And the plaintiff further saith, that afterwards, and after the recovery of the said judgment, to wit, on the 4th day of Nov. in Michaelmas Term, A. D. 1842, a certain rule was made by the Court of our Lady the Queen, before the Barons of her Exchequer, in the said last mentioned action, by which rule it was ordered that the plaintiff should shew cause on Wednesday, the 9th day of Nov. then instant, why the said order of the said Mr. Justice *Coleridge*, and all proceedings thereupon had, should not be set aside, with costs to be paid by the plaintiff, together with the costs of the proceedings before Mr. Justice *Cresswell* in relation to the said order, being the proceedings hereinbefore in that behalf mentioned, and of that application, or why the defendants, thereby meaning the defendants in the said last mentioned action, should not have a fortnight after judgment pro-

nounced on that rule, or such other time as the Court should order in that behalf, to render themselves into custody as to the said last mentioned action, in discharge of their bail, and why all proceedings upon the bond should not be set aside with costs, and that in the meantime all proceedings in the last mentioned cause and against the defendants' bail should be stayed, upon notice of that rule to be given to the plaintiff, his attorney, or agent. And that neither the now defendant, nor the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, nor any, nor either of them rendered themselves, or himself to the custody of the gaoler of the said Court of Exchequer, according to the practice of the same Court, or within the time mentioned in the said orders, or any, or either of them after judgment had been so recovered as aforesaid, or within any other time, or in any manner lawfully directed by the same Court, or any Judge thereof, after judgment had been so recovered as aforesaid, according to the form and effect of the said condition of the said writing obligatory, but wholly neglected, omitted, and refused so to do, and the condition of the writing obligatory is, and remains wholly unperformed, contrary to the form and effect of the said writing obligatory, and of the said condition thereof, &c. &c.

Amongst other pleas the defendant pleaded, secondly, that after the recovery of the judgment in the declaration mentioned, and before the commencement of this suit, no writ of capias ad satisfaciendum was sued or prosecuted out of the said Court of Exchequer against the defendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, or any or either of them, upon the said judgment, and returned in the said Court. Verification.

Fourthly. That the said order so made by the said Sir *John Taylor Coleridge*, as in the declaration mentioned, was made before the time for rendering the said defendant, the

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said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, in the said action so commenced against them as in the declaration mentioned, according to the practice of the said Court of Exchequer, had expired or elapsed, and that the said order was made ex parte on the application of the said plaintiff, and without any previous summons of, or any previous notice to the said defendant, the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, or any of them, or any agent, attorney, or solicitor of them, or either of them. Verification.

Fifthly. That the said order was so made by the said Sir *John Taylor Coleridge*, as aforesaid, before the time for rendering the said defendant, the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, in the said action, according to the course and practice of the Court in which the same was so brought, as aforesaid, had expired or elapsed; and that after the making of the said order by the said Sir *John Taylor Coleridge*, as in the said declaration mentioned, and before the said ten days after the service of the said copy of the said order, as in the said declaration mentioned, had expired or elapsed, the said order stated in the declaration to have been firstly made by the said Sir *Cresswell Cresswell*, was made by the said Sir *Cresswell Cresswell*, as in the said declaration mentioned, to wit, on, &c., and that afterwards, and after the making of the said last mentioned order, and before the expiration of the time, to wit, the said week given and appointed in and by the said last mentioned order for the making of the said surrender, as therein and in the said declaration mentioned, the said order stated in the said declaration to have been secondly made by the said Sir *Cresswell Cresswell*, was made by the said Sir *Cresswell Cresswell*, then being such Justice as aforesaid, as in the said declaration mentioned, to wit, on, &c.; and that afterwards, and after the making of the said last mentioned

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order, and before the fifth day of Michaelmas Term, in the said last mentioned order, the said rule so made by the said Court of our Lady the Queen, before the Barons of her Exchequer, as in the said declaration mentioned, was made by the said Court, to wit, on, &c.; and further, that afterwards, and after the making of the said last mentioned rule by the said Court as aforesaid, and within a reasonable time for that purpose, to wit, on, &c., notice of the said rule was given to the said plaintiff, as in and by the same is directed, and according to the course and practice of the said Court; and that afterwards, in Michaelmas Term, A. D. 1842, to wit, on the 24th day of November, in the year aforesaid, cause was shewn against the said rule, and the said rule, and matters therein contained, were argued and discussed before the Court aforesaid, according to the course and practice of the last mentioned Court, and the said Court did thereupon, by a certain other rule, then duly made according to the course and practice thereof, among other things, order and direct, that the said now defendant, the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, and their bail or sureties, James Oxley Bridges, and Joseph Arthur Ballantine, should have ten days from the day of the making of the rule now in recital to render the said now defendant, the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan in the said action so brought against them as aforesaid. And the defendant further saith, that afterwards, and after the making of the said last mentioned rule, and before the commencement of this suit, and before the expiration of ten days from the day of the making of the said last mentioned rule, and within the time for that purpose therein limited and appointed as aforesaid, to wit, on the 28th day of November, in the year aforesaid, the said now defendant, the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, and each and every of them, did respectively render themselves

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to the custody of the gaoler of the said Court, as in and by the said last mentioned rule was directed and ordered, and according to the form and effect, true intent and meaning of the said condition. Verification.

The sixth plea stated at length, that after making the bond, but without alleging it to have been after judgment in the action brought for the recovery of the original debt, the defendant, and D. W. Acraman, and A. J. Acraman, being traders, and indebted, and having committed acts of bankruptcy, were declared bankrupts, and obtained their certificate, which was duly allowed before the commencement of this action.

Seventhly. That before the making of the said writing obligatory in the declaration mentioned, and long before the commencement of the action in the declaration mentioned, to wit, &c., a certain action was commenced by the plaintiff against the defendant, and the said Daniel Wade Acraman, Alfred John Acraman, Thomas Holroyd, and William Morgan, in her Majesty's Court of Exchequer at Westminster, for the recovery of the same identical debt in the said condition mentioned, together with such costs of the plaintiff as should be given in the same; and the said action then and from thence, until and at the time of the making of the said writing obligatory, was, and from thence hitherto hath been, and is still pending in the said Court of Exchequer, and the plaintiff could and might have recovered, and may recover in the said last mentioned action the said debt in the said condition of the said writing obligatory mentioned. And the defendant further saith, that at the time of the making of the said writing obligatory, the said action in the declaration mentioned had not been commenced, and the said writing obligatory was then meant and intended by the several parties thereto to apply, and did apply to the said action so commenced by the plaintiff as in this plea mentioned, and was not, by the said parties, or any of them, meant and intended to apply, and did not apply to the said action so

commenced, and in which judgment was so obtained, as in the declaration mentioned; and this, &c. Verification.

The eighth plea was to the same effect as the sixth plea.

To these pleas the plaintiff demurred specially.

Sir *T. Wilde*, (with him, *Manning*, Serjt.) for the plaintiff. The first question arose upon the second plea. The defendant insisted that the bond recited in the declaration was not forfeited, unless a writ of capias ad satisfaciendum issued. That was not so. A bond was not a proceeding in a cause, and differed from a recognizance of bail, which was such a proceeding. In *Sandon* v. *Proctor and Another* (*a*), Mr. Justice *Bayley*, citing the case of *Powell* v. *Taylor* (*b*), and *Tidd's Practice*, p. 1129, *9th ed.*, said, "They (the bail) may also plead, in discharge of their liability, that there was no capias ad satisfaciendum sued out, and returned against the principal, and if there be a void writ, it is as none. But if the writ be merely *irregular*, as if it was sued out after a year, without a scire facias, or made returnable on a day out of Term, or if it has not lain four days in the sheriff's office, the bail cannot take advantage of the irregularity by pleading."—"It is insisted, that the suing out of a ca. sa. against the principal is rendered necessary only by the rules and practice of the Court;"—"but it seems to me that the obligation to sue out a ca. sa. results by law from the terms of the recognizance."—"In *Hobs* v. *Tedcastle* (*c*), it was decided, that the plea of no ca. sa. is a good plea, because, by the construction put upon the terms of the recognizance, the bail are not bound to render their principal until the plaintiff sues out the ca. sa. The case of *Dudlow* v. *Watchorn* (*d*) was properly decided, because there was a valid ca. sa. sued out in that case. For it is a general rule of law that the execution must pursue the judgment, and that a ca. sa. must be directed to the sheriff

(*a*) 7 B. & C. 800.
(*b*) *Tidd's Pract.* 1129, 9th ed.
(*c*) Cro. Eliz. 597.
(*d*) 16 East, 39.

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of that county in which the action is brought. I am not aware of any case where a party, who in pleading has relied upon the practice of the Court, has not failed. In *Donnelly* v. *Dunn* (*a*), to an action on the recognizance of bail, the defendant pleaded the bankruptcy of his principal, and there was a general demurrer. The bankruptcy of the principal is a ground for an application to this Court to enter an exoneretur on the bail-piece. But it was decided that it could not be pleaded." Before this case, it was considered to be the result of the practice, and not of the terms of the recognizance, which could be pleaded; but this case corrected the mistake, and Mr. Justice *Holroyd*, in *Sandon* v. *Proctor* (*b*), said, "I have entertained some doubts in this case, and those doubts were caused by some expressions which fell from the Court in *Dudlow* v. *Watchhorn*. But I am now satisfied that a mere matter of practice cannot be pleaded. There is a material distinction between those things which are required to be done by the common or statute law of the land, and things required to be done by the rules or practice of the Court." Any matter which may be taken advantage of in a Court of Error may properly be pleaded; but mere matter of irregularity, depending on the rules of another Court, of which rules a Court of Error cannot be supposed to have any knowledge, cannot be pleaded. *Cherry* v. *Powell* (*c*) was to the same effect. The Courts have said, that what they meant by the terms of the recognizance, though absolute, was only that it should attach upon process awarded. The question here, is upon a bond given by the 1 & 2 Vict. c. 110, s. 8; the language is distinct, and differs from that to which the construction in question has been given by the Court. The words of the statute are, to render "according to the practice of such Court, or within such time and in such manner as the said Court, or any Judge thereof,

(*a*) 2 B. & P. 45.
(*b*) 7 B. & C. 800.
(*c*) 1 D. & R. 50.

shall direct." A distinct mode is presented by the statute, by which the election may be shewn. On a recognizance, it required no order of a Judge to compel a render; the issuing of the capias was sufficient. Under this statute the matter is distinct, and the order of a Judge is a sufficient indication of election, and which was the only reason why, under a recognizance, a capias was required. [*Tindal*, C. J.—Here there is an alternative; he is to render according to the course and practice of the Court, or according to the order.] Various matters are necessary to get the committitur, or bail-piece, and each Court has power to point out the various steps. A man does not render by merely going to gaol: certain acts are necessary to obtain the exoneretur. Here, there is no reason for holding a capias necessary, there being another mode pointed out. The statute contemplated a render being made in a manner different from that pursued under a recognizance of bail; otherwise the words 'in such time and manner as the Court, or Judge, shall direct,' would have been unnecessary, if the intention were only to confer the power of extending the time to render, for that might, under the practice of the Court, have always been done. Under this act, the sureties cannot render; it was so held in the Court of Exchequer by Baron *Parke* on motion. [*Maule*, J.—In *Owston* v. *Coates* (*a*), the Court of Queen's Bench held differently. In delivering the judgment of the Court, Lord *Denman*, C. J., there says, "The practice of the Court, as to render, applies only to cases when a defendant is at large upon bail, and, when rendered, the defendant is in custody under the writ upon which he was originally taken. In the present case there is no such writ, nor any bail; but we think that, in order to give effect to the act of Parliament, we must construe it to have placed the defendant, who has found sureties by bond

(*a*) 10 A. & E. 193; S. C. 2 P. & D. 485.

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under the eighth section, in the same situation as if he had been arrested and given bail, and to have treated the obligors in the bond as bail in the action. Some doubt existed as to the words 'after judgment' in the eighth section. We think they do not apply to a render, 'according to the practice of such Court;' and as bail would, by that practice, have been at liberty to render a defendant after verdict and before judgment, we think that the obligors in this bond must be at liberty to do the same."] A Judge's order with notice is a far more useful means of gaining information than the lodgment of a ca. sa., for, every purpose of that writ is effectually obtained by the order. [*Erle*, J.—In what manner would the defendant be charged? Under the Judge's order or how?] Under the Judge's order. [*Erle*, J.—Could the plaintiff issue a fieri facias?] He could be charged in execution by habeas: a capias would be unnecessary.

Then as to the fourth plea. The question on that is, whether an ex parte order was sufficient. That is not, however, open to the defendant, as, if it were irregular, the proper course would be to apply to set it aside; but however irregular, it is valid while it subsists; its validity can not be disputed in a collateral proceeding. Consequences of a most dangerous character would ensue, if an order could be resisted on account of its irregularity. It may have been the intention of the Legislature to say that an ex parte order was sufficient with reference to the old practice. [*Maule*, J.—How would it appear on the roll?] The order might be set out upon the roll. [*Maule*, J.—Then it would be necessary to alter the practice.] It might not be necessary to set it out on the roll. In *Tidd's Practice* the ordinary form does not set it out, except when the exoneretur is entered on the bail piece. A defendant who is in Court may be committed by the Court upon the prayer of the plaintiff. If so, then the Court cannot enter into the regularity of Mr. Justice *Coleridge's* order, but it

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can into his power to make it; but there is no render under the order of Mr. Justice *Cresswell*, or under that of Mr. Justice *Coleridge*. [*Tindal*, C. J.—The words were, in favorem defendentis.]

Then as to the fifth plea. The words of the rule nisi are most important. The time for the render under Mr. Justice *Cresswell's* order expired on the 5th day of Michaelmas Term. A rule nisi was obtained, which does not extend the time for the render, but only calls upon the plaintiff to shew cause why the order of Mr. Justice *Coleridge* should not be rescinded, and why such further time as the Court should order should not be given to render in. The rule might be pending for a year, and in respect of that delay, the plaintiff was entitled to maintain his action: that is, for not rendering. [*Erle*, J.—Had not the defendant three alternatives? render according to the practice of the Court, or a Judge's order, or a rule of Court; he has the benefit of any of these modes, and if he complies with one it is sufficient.] If he had not previously committed a breach; if the order of Mr. Justice *Cresswell* was not complied with, the Court of Exchequer had no power to extend the time, and a right of action would have accrued.

Then, with regard to the seventh plea, the pending of the writ there alleged might form the ground of a plea in abatement to the former action, but could not constitute a good plea in bar to the present. The language of the bond is general, referring to any action whatever. With reference to the sixth and eighth pleas, as they were the same in effect, the observations which applied to one would be applicable to the other. Neither stated whether the fiat had been issued before or after the judgment. It must, therefore, be treated as having issued before the judgment. It must be admitted that the certificate was a bar to the original bill, but it was not therefore a bar to this bond, which was a collateral security. That it was not a bar, the case of *Jameson* v. *Camp-*

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bell (*a*) was an authority. There, a bond was given under the 4 Geo. 3, c. 33, s. 1, by a member of Parliament being a trader, and after his bankruptcy, judgment was obtained in the suit in which the bond was given. The Court held that the bankruptcy and certificate were not a discharge to the bond. There, *Abbott*, C. J., said, "This certificate undoubtedly operated as a discharge in law from the debt due on the bill of exchange, and also from the costs of the action upon the bill; the costs being considered, as to this point, only as an accessary to the debt. And it was contended on the part of the defendant, that being thus discharged from the payment of all that was recovered by the judgment in the first action, he is, by consequence, discharged also from the bond given to secure the payment of what should be so recovered. But we think this consequence does not follow from the premises. There may be two securities for the same payment, one of which shall be barred by a certificate, and the other not barred. Thus, if the grantor of an annuity executed a deed of covenant for payment of the annuity as it should from time to time accrue due, and also a bond in a penal sum, with a condition for the like payment, if the bond was forfeited, so as to make the penalty a debt at law before bankruptcy, a certificate afterwards obtained discharged the grantor from all suit on the bond, as well for future as prior payments of the annuity; but such a certificate did not discharge him from his deed of covenant, as it respected future payments, until the statute 49 Geo. 3, c. 121, was passed." In that case it would be also observed that the bond was simply for the payment of money without any alternative of render, or doing any other act. At the time of the bankruptcy the bond had not been forfeited, and therefore it was impossible for the plaintiff to prove under the fiat. On these grounds it was submitted that the plaintiff was entitled to judgment.

(*a*) 5 B. & A. 250.

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Talfourd, Serjt., (*Keating* and *J. W. Smith* with him), for the defendant. In the case of recognizance of bail, it was absolutely necessary, in order to fix the bail, that the writ of capias ad satisfaciendum should issue; and the cases shewed that this necessity arose from the construction put upon the recognizance, and not from the practice of the Court. The bond in the present instance was similar in its language to a recognizance of bail, and the defendant contended that a similar construction should be put on that language which would necessitate the issuing of a capias ad satisfaciendum. The object of the statute was to substitute a new act of bankruptcy for the old one under the 6 Geo. 4, c. 16, of lying in prison for 21 days, at the same time that it obviated the necessity of actually imprisoning the debtor. Now, the terms of the recognizance in the Queen's Bench formerly differed from those of the recognizance in this Court; but in both, the capias ad satisfaciendum was required to be issued. The object of the capias ad satisfaciendum was, to give notice to the sureties that the plaintiff intended to proceed against the person of the defendant, and not against his goods by fi. fa. It also apprised them of the amount of the judgment. *Holroyd*, J., in the case of *Sandon* v. *Proctor* (*a*), observed, "the party entering into the recognizance, engages that the defendant shall pay the damage, *or render himself*. The latter words have been construed to import, not that the defendant is bound to render at all events, but only in case he is required by the plaintiff in the action so to do; and the suing out of the capias ad satisfaciendum, is notice to the bail that the plaintiff does require the defendant to be rendered." The language of *Littledale*, J., was to the same effect. [He referred also to *South* v. *Gryffith* (*b*); *Weddall* v. *The Manucaptors of Jocar* (*c*); *Wilmore* v. *Clerk* (*d*).] The Legislature then knowing the construction which had been put by the Courts on a recognizance of bail, prescribed

(*a*) 7 B. & C. 800.
(*b*) Cro. Car. 481.
(*c*) 10 Mod. 267.
(*d*) 1 Ld. Raym. 156.

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the form of this bond; and, therefore, it must be assumed that it intended a similar construction to be put upon similar language. The question was, what was the meaning of the words "according to the practice of the Court." If they meant after the issuing of the capias, cadit quæstio. If on the other hand they meant the time as well as the mode of render, then the declaration did not allege when the practice required the render to be effected, and so no breach of the bond was disclosed. [*Maule*, J.—The words of the section seem to refer both to time and mode, but it is consistent with the allegations in this declaration, that the time for rendering may be twelve months after the judgment.] The object of the statute was to enable the Courts to exercise their discretion in the length of time which the sureties were allowed to render the defendant. It certainly was not the intention to limit the time for the render, which was the effect of Mr. Justice *Coleridge's* order. That learned Judge had no jurisdiction to make such an order, and certainly not to make it ex parte. These two latter objections were disclosed in the fourth plea, which therefore afforded an answer to the present action. Then, as to the fifth plea, the declaration alleged a breach in omitting to render according to the order of *Coleridge*, J. which was afterwards extended by *Cresswell*, J.; no doubt one learned Judge might vary the order of another, but the Court of Exchequer had, by a rule, given the defendant further time to render, and this Court had no power to question the propriety of that rule, so long as it continued in force, it was a mere matter of practice of that Court, with which this Court could not interfere; *Mellish* v. *Richardson* (*a*); unless, indeed, it could be said that that Court had acted without jurisdiction. The seventh plea was good, the words of sec. 8, no doubt, were, that the bond should be given, "to pay such sum or sums in any action or actions which shall have been brought, or shall hereafter be brought for the recovery of the same."

(*a*) 1 Clark & Finn. 224.

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Those words could not have been intended to permit the plaintiff to split his demand into any number of causes of action, or that, in case of the plaintiff being nonsuited in one action, the bond should be extended to a fresh action brought in respect of the same claim. The object of using the words "action or actions," was to extend the operation of the bond to those cases where several creditors might be interested in the demand, or the debts might be due in different rights. But if the construction for which the plaintiff contended were put upon the bond, it would be productive of great unfairness and vexation. In the case of the old recognizance of bail antecedent to the statute, if there was a variance between the claim stated in the affidavit of debt, and the subject of the action, the bail were discharged. The bond in the present case was analogous to the recognizance of bail in other respects, and there was no reason why the analogy should not be pursued. In the present case the plaintiff had elected to bring this action, and by that election he must be bound. As to the sixth and eighth pleas, the certificate there disclosed operated as a discharge of the defendant from this action. The case of *Jameson* v. *Campbell* (*a*), which had been cited on behalf of the plaintiff, could not be considered as an authority in the present case, as it was decided before 6 Geo. 4, c. 16; sections 51 and 56 of which materially altered the law in such cases. In *Dinsdale* v. *Eames* (*b*), the defendant in an action on a bail bond given in an action of debt against himself, becoming bankrupt between plea and verdict in the action on the bail-bond, and obtaining his certificate after judgment, was held to be discharged from damages and costs. [*Maule*, J.—That was a case of an application to the equitable jurisdiction of the Court.] The ground, however, on which the decision of the Court there proceeded, would be applicable to the present case, as it was, that the substance of the action on the bail-bond was the same as that on the original debt, which original debt had

(*a*) 5 B. & A. 250. (*b*) 2 B. & B. 8; S. C. 4 Moore, 350.

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been barred by the certificate. In *Littlewood* v. *Crowther* (*a*), this case was treated as an authority, and the decision in that Court proceeded on it. But those cases were before the 6 Geo. 4, c. 16, ss. 51 and 56. Those provisions removed the ground on which the case of *Jameson* v. *Campbell* (*b*) depended, and therefore left it no authority in the present case. By the latter section it is provided, "that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends." If, therefore, in the present case the plaintiff had thought proper to prove his debt in conformity with the provisions of this section, he might have done so. The certificate, therefore, operated as a bar. For these reasons the judgment of the Court ought to be for the defendant.

Sir *T. Wilde*, in reply. No analogy existed between a recognizance of bail before the 1 & 2 Vict., and the bond required by that statute. In *Hayward* v. *Heffer and Another* (*c*), where the Court of Queen's Bench held that it had no power, on the application of the sureties in the bond, suggesting that the principal had rendered, to order it to be delivered up to be cancelled; *Patteson*, J., said, "the recognizance is the creature of the Court; here the giving

(*a*) 3 D. & R. 533.
(*b*) 5 B. & A. 250.
(*c*) 5 Q. B. 398; S. C. 1 D. & M. 454.

of the security is directed by a statute." Any arguments, therefore, derived from proceedings on recognizances of bail, were inapplicable to the present case. The case of *Sandon* v. *Proctor* (*a*) merely decided, that where it was sought to fix the bail, it was necessary to sue out a capias ad satisfaciendum, in order to give them notice of the plaintiff's intention to proceed against the person of the principal debtor; but here, the action was against the principal debtor, who was bound either to pay his debt or render. When a forfeiture had taken place the render was unavailable, and the only mode in which the bail could take advantage of the render of the bankrupt, was by a summary application to the Court for the exercise of its equitable jurisdiction, and not by way of plea. Then with regard to the provisions of the 6 Geo. 4, c. 16, s. 56, they were inapplicable to such a case as the present; for, the provision contained in that section only applied to those cases where the bankrupt actually owed the debt at the time of the bankruptcy, although the amount of it required to be ascertained, and was capable of being ascertained. Here, however, no debt was in existence at the time of the bankruptcy, as the contingency which was to give rise to the debt had not then occurred. The case of *Atwood* v. *Partridge* (*b*), was an authority for this view; there, the defendant covenanted for the due payment by A. B. of a premium upon a policy of insurance, effected to secure a debt due from A. B. to the plaintiff. The premium became due on June the 17th, and being unpaid by A. B. on June the 20th, the defendant obtained a certificate, in respect of an act of bankruptcy, before the 17th. The Court there held, that the defendant was not discharged from his liability for the premium, which the plaintiffs had been obliged to pay to keep the policy on foot. That was a direct authority against the validity of the sixth and eighth pleas.

Cur. adv. vult.

(*a*) 7 B. & C. 800.
(*b*) 4 Bing. 209; S. C. 12 Moore, 431.

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TINDAL, C. J.—This was an action upon a bond entered into in pursuance of the statute 1 & 2 Vict. c. 110, s. 8.

The declaration set out the bond and the condition, by which, after reciting that the plaintiff had made an affidavit that a debt of 1650*l.* was due to him from the defendant and his partners, who were traders within the bankrupt laws, and further reciting, that the plaintiff had, on the 23rd and 24th of March, 1842, caused the defendant and his partners to be served with a copy of the affidavit, and with a notice requiring immediate payment of the debt; also reciting that James Oxley and Joseph Arthur Ballantine had agreed to join the defendant and his partners in the said writing obligatory, subject to the condition for making the same void, as sureties for defendant and his partners; the condition was declared to be, that if the defendant and his partners, or the said Oxley and Ballantine, or any or either of them, should pay such sums as should be recovered in any action which had been or should be brought for recovering the said debt, or if the defendant and his partners should render themselves to the custody of the Court in which such action had been or might be brought, *according to the practice of such Court or Courts, or within such time, and in such manner, as the said Court or Courts, or any Judge thereof respectively should direct, after such judgment should have been recovered in such action or actions*, then the said writing obligatory to be void. The declaration then stated, that after making the said writing obligatory, an action was commenced by plaintiff against defendant and his partners in the Court of Exchequer, in which the sum of 1698*l.* 6*s.* was adjudged to the plaintiff for his damages and costs, of which the sum of 1650*l.* is the debt in the condition mentioned, and 33*l.* 11*s.* 6*d.* is for interest, and 14*l.* 13*s.* 6*d.* costs of suit, of all which defendant had notice. The declaration further states, that neither the defendant, nor his partners, nor the sureties, paid the sum recovered, or any part of it. It further states, that after the recovery of the judgment, by an order of Mr.

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Justice *Coleridge*, made on the application of the plaintiff, it was ordered, that the defendant and his partners should surrender themselves to the custody of the Marshal of the Queen's Prison, within ten days after service of a copy of the order, a copy whereof was afterwards, to wit, on the 20th and 23rd of August, served on the defendant and his partners, and that ten days from the service of that order had elapsed before the commencement of the suit. The declaration further states, that afterwards, to wit, on the 26th of August, 1842, Mr. Justice *Cresswell* made an order, by which it was ordered, that the time for the defendant and his partners to render should be enlarged for a week, and that the further hearing of a summons for setting aside the order of Mr. Justice *Coleridge* should be adjourned until the 2nd day of September, 1842. The declaration further states, that on the 2nd of September, 1842, an order was made by Mr. Justice *Cresswell*, by which it was ordered, that the time for surrendering the defendant and his partners should be enlarged till the fifth day of Michaelmas Term, without prejudice to the right of the bondsmen to render the defendant and his partners in the mean time, or to the right of the plaintiff to treat the bond as forfeited. The declaration further states, that afterwards, and after the recovery of the said judgment, to wit, on the fourth day of Michaelmas Term, by a rule of the Court of Exchequer made in the said last mentioned action, it was ordered, that the plaintiff should shew cause on Wednesday, the 9th day of November, why the order of Mr. Justice *Coleridge*, and all proceedings had thereupon, should not be set aside, with costs to be paid by the plaintiff, together with the costs of the proceedings before Mr. Justice *Cresswell* in relation to the said order, and of that application; or why the defendants (meaning the defendants in the said last mentioned action) should not have a fortnight after judgment pronounced on that rule, or such other time as the Court should order in that behalf, to render themselves into custody as to the said last mentioned action, in

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discharge of their bail, and why all proceedings on the bond should not be set aside with costs, and that in the mean time all proceedings in the said last mentioned cause and against the defendant's bail should be stayed. The declaration further states, that neither the defendant nor his partners nor any of them rendered themselves to the custody of the gaoler of the Court of Exchequer according to the practice of the same Court or within the time mentioned in the said orders, or any, or either of them, after judgment had been so recovered as aforesaid, or within any other time or in any manner lawfully directed by the same Court or any Judge thereof after judgment had been so recovered as aforesaid, according to the form and effect of the condition.

To this declaration the defendant pleaded several pleas, some of which form the subject of demurrer. The 2nd plea is that after the recovery of the judgment and before the commencement of this suit no writ of capias ad satisfaciendum was sued or prosecuted out of the Court of Exchequer against the defendant and his partners, or any of them. And the plaintiff having demurred to this plea, the first question in the cause is, whether this plea furnishes an answer to the declaration. It has been settled by various decisions that to a scire facias on a recognizance of bail, it is a good plea, that there was no writ of capias ad satisfaciendum issued against the principal; *Sandon* v. *Proctor* (*a*); *South* v. *Gryffith* (*b*); *Weddall* v. *The Manucaptors of Jocar* (*c*); *Wilmore* v. *Clerk* (*d*). The necessity for a capias ad satisfaciendum did not rest on a mere rule of practice, but was the construction put by law on the terms of the recognizance: for as was said in the case of *Wilmore* v. *Clerk*. "The condition of the recognizance is, that if the defendant be condemned in the action, he shall pay the condemnation, or render his body to prison. The question then will be, at what time this render ought to be made. And

(*a*) 7 B. & C. 800.
(*b*) Cro. Car. 481.
(*c*) 10 Mod. 267.
(*d*) 1 Ld. Raym. 156.

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the law says, it ought to be, when the plaintiff in the original action has signified, that he will sue execution against the body which he does by suing of the capias ad satisfaciendum." But it was contended on behalf of the plaintiff that although the rule was established with reference to a recognizance of bail, it ought not to apply to a bond under the statute 1 & 2 Vict. c. 110; that a recognizance of bail was an instrument peculiarly under the controul of the Courts, which had put an arbitrary construction upon it not entirely consistent with the natural import of its terms. But even if this were admitted to be so, still such is the established construction of the recognizance; and as the bond directed to be given under the statute of Victoria is evidently penned in analogy with and nearly in the terms of the recognizance of bail, and as the terms of the latter have obtained a judicial signification, we see no reason to doubt, that the words of the bond were intended to bear the same sense. Nor are the words which follow "according to the practice of the Court," so immaterial as they were represented by the plaintiff's counsel; for although the necessity for the issuing of a writ of capias ad satisfaciendum is not strictly speaking a mere matter of practice but is required by a rule of law; yet a render made upon the issuing of such a writ falls aptly within the description of a render to the custody of the gaoler of the Court according to the practice of the Court; and as the words in question are obviously referred to some recognised course of practice, it is not easy to see what other practice the statute can intend to refer to, than that which actually prevailed in case of a recognizance of bail. We think therefore the plea is a good answer to the action.

The defendant further pleaded, 4thly, that the order of Mr. Justice *Coleridge* was made before the time for rendering the defendant and his partners, according to the practice of the Court, had expired, and was made ex parte, and without any previous summons. The plaintiff has demurred, and we think the plea is bad. It seeks to invalidate the order of Mr. Justice *Coleridge* on two grounds,

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first because the time for rendering had not elapsed when the order was made; but, it is quite consistent with the plea that the time for rendering would have expired before the time limited by the order for the defendant and his partners to render, and if any order is made which operates to extend the time for rendering, such an order ought to be made before the time has expired for rendering. The second ground of objection that the order was made ex parte and without a summons is also of no weight; the remedy for a defect in an order, if any exist, is by application to the Court to set aside the order, but until it be set aside, the order cannot be treated as a nullity. It is a further objection to this plea that even if the order of Mr. Justice *Coleridge* be void, the defendant shews no justifiable cause on this plea for not rendering pursuant to the practice of the Court or the orders of Mr. Justice *Cresswell*. The plaintiff therefore is entitled to succeed on this demurrer.

The defendant has further pleaded, 5thly, that the order of Mr. Justice *Coleridge* was made before the time for rendering the defendant and his copartners had expired; and that before the expiration of ten days from the service of the order of Mr. Justice *Coleridge*, the first order of Mr. Justice *Cresswell* was made; and that before the expiration of the time mentioned in the last order, the second order of Mr. Justice *Cresswell* was made; and that before the 5th day of the next Michaelmas Term the rule of the Court of Exchequer in the declaration mentioned was made; and that after the making of the said last mentioned rule and within a reasonable time for that purpose, notice of the said rule was given to the plaintiff as by the same directed, and according to the practice of the Court; that afterwards cause was shewn according to the course and practice of the Court; that thereupon the Court did by a certain rule duly made, according to the course and practice of the said Court, order and direct that the said defendant and his partners and their bail or sureties should have ten days from the day of the making of the said rule to render the defendant and

his partners; and that within the time so limited the defendant and his partners rendered themselves to the custody of the gaoler of the Court. The plaintiff demurred to this plea, on the ground that the order of Mr. Justice *Cresswell* only gave time to the defendant and his partners to render until the 5th day of Michaelmas Term, and that the rule nisi of the Court did not give any extended time for the render; and it was contended, that on the 5th day of Michaelmas Term the condition was broken and a right of action vested in the plaintiff. But it appears to us, that as, when the rule nisi was granted, it was competent for the Court under the act of Parliament to grant an extended time for the render, the Court in granting the rule to shew cause why the time should not be extended, preserved their jurisdiction entire, and retained the right of making an order for an extension of the time, in the same state as they possessed it when they granted the rule nisi. It seems to us therefore that the defendant is entitled to judgment on this plea.

The 6th plea sets up in answer to the declaration on the bond, a certificate in bankruptcy on a fiat issued after the making of the writing obligatory, but not appearing to have been issued after the recovery of judgment in the action brought for the recovery of the original debt. The plea not stating the fiat to have been issued after the recovery, in deciding on the validity of the plea it must be assumed that it issued before the recovery. The original debt in this case is undoubtedly barred, but it will not follow as a consequence, that a bond given to secure the payment of the debt will be also barred; for which the case of *Jameson* v. *Campbell* (*a*) is in point. We must therefore, look to the provisions of the statute 6 Geo. 4, c. 16, to determine the point.

The certificate is by s. 126, of that act a bar to all debts and demands made proveable against the bankrupt. And the question will be, whether this bond is proveable under the

(*a*) 5 B. & A. 250.

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fiat. The only sections under which it can be proveable, are the 51st or the 56th sections. By the 51st section, persons who have given credit to the bankrupt for any money or other matter or thing which shall not have become payable when the bankrupt committed an act of bankruptcy whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such bill, bond, note, &c., as if the same were payable presently, and receive dividends equally with the other creditors, deducting only a rebate of interest to be computed from the declaration of a dividend, to the time such debt would have become payable. This section, as far as it relates to bonds, is to the same effect as, and nearly in the terms of, the statute 7 Geo. 1, c. 31, s. 1, by which bonds, though not presently payable, were admitted to be proved; and it has been decided, upon the construction of that statute, that a bond conditioned for the payment of money on the happening of an event, at a future uncertain period, could not be proved, ex parte *Barker* (*a*); and it appears to us that the same rule must apply to the 51st section of 6 Geo. 4, c. 16. In the present case, it is not only uncertain at what time any debt will be due on the bond, but also whether a debt will ever become due; as it is uncertain whether the condition of the bond will be broken. This debt, therefore, is not proveable by virtue of the 51st section. The 56th section provides, that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are required to ascertain the value thereof, and to admit such person to prove, or if the value shall not be so ascertained before the contin-

(*a*) 9 Ves. 110.

gency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, provided he had not notice when such debt was contracted, of any act of bankruptcy by the bankrupt committed. In the construction of this section a distinction has been taken (in the case of ex parte *Marshall* (*a*), cited and relied upon by Mr. Justice *Erskine* in *Abbott* v. *Hicks* (*b*),) between contingent liabilities which may never become debts, and debts payable on a contingency; and it has been held, that the latter only which are proveable under the commission. The present case, although in form, a case of debt on bond, yet the bond being defeasible on performance of the condition, it is, in substance, not the case of a contingent debt, but of a contingent liability. At the time when the fiat issued, it was quite uncertain whether any debt would ever arise upon the bond; it was at that time a liability which would not become a debt unless the condition were broken. It appears to us, therefore, that judgment should be for the plaintiff on the demurrer to the 6th plea, and also on that to the 8th, which does not raise any other question than that raised by the 6th plea.

The 7th plea states, that before the giving of the bond an action was commenced by the plaintiff against the defendant and his partners for the recovery of the same identical debt in the condition mentioned, and that the said action, until and at the time of making the said writing obligatory, and from thence hitherto, hath been and still is pending, and that the plaintiff could and might have recovered in the said action the said debt; and that at the time of making the said writing obligatory, the said action in the declaration mentioned had not been commenced; and that the said writing obligatory was meant and intended by the several parties thereto to apply, and did apply, to the said action so commenced by the plaintiff, as in the said plea men-

(*a*) 1 Mont. & Ayr. 145.
(*b*) 7 Scott, 733; S. C. 5 Bing. N. C. 578.

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tioned, and was not by the said parties, or any of them, meant or intended to apply, and did not apply, to the said action so commenced, and in which judgment was so obtained as in the declaration mentioned.

The plaintiff has demurred to this plea, and it seems to us that the plea is bad. What the parties meant and intended, and to what action the bond applied, must be collected from the terms of the condition, and no averment can be taken to contradict what appears on the face of the instrument. The condition is, to pay such sums as should be recovered in any action which then had been, or thereafter should be, brought for the recovery of the debt; and it is in direct contradiction of the terms made use of, to aver that the bond applied only to the sum to be recovered in an action before then brought.

We think, therefore, that this plea also is bad, and that judgment should be given for the plaintiff on the demurrer thereto.

Judgment accordingly.

Sc. 2 CB. 429.

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Trespass to a mill, fixtures, &c. Plea, that the defendants, as assignees of a bankrupt, became possessed of the term in the mill, and the fixtures, &c. Replication, that the bankrupt, before his bankruptcy, mortgaged the mill and fixtures, &c. to R., who entered: that it was afterwards, and before the bankruptcy, agreed between the plaintiff, the bankrupt, and R., that the plaintiff should accept a lease of the premises, and purchase the fixtures, &c., whereupon the plaintiff entered: *Held*, on special demurrer, that the replication was not ambiguous or double.

TRESPASS for breaking and entering a certain mill, manufactory, and premises of the plaintiff, and seizing and taking certain fixtures, engines, machinery, and utensils of the plaintiff attached thereto, and removing them and carrying away other machinery, goods and chattels of the plaintiff, and disposing thereof to the use of the defendants.

The defendants pleaded, thirdly, that one George Taylor being seised in fee of the ground whereon the mill and premises were erected, demised the close to one Charles Berner for ninety-seven years from the 29th of September, 1804; that Berner, before the erection of the mill, &c.,

5. D. & L. 506

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demised the close to John Kerrison for sixty-one years from the 29th September, 1806; and that Kerrison, in 1835, demised the close to Joseph Hadley Reddell for twenty-one years from the 25th of December, 1835. That by means of the bankruptcy of Reddell, and an intermediate assignment, the last-mentioned term became vested in Joseph Freeman, who, before the erection of the mill, &c., in 1840, demised the close to Reuben Hunt for seventeen years from Christmas, 1839, wanting fourteen days, who built the mill, and placed the fixtures and goods in the declaration mentioned in it, the fixtures being trade fixtures and removeable by the tenant during the term. That on the 26th of June, 1840, Hunt became bankrupt, and that the defendants and David Cannan became his assignees, and accepted the lease; that the plaintiff claiming title under colour of a fraudulent and void lease to him made by Hunt, the defendants entered and committed the acts complained of. Verification.

Replication. That after the lease to Hunt, and the erection of the mill and premises, and the fixing and placing of the fixtures and goods in the declaration mentioned in and upon the same, and before his bankruptcy, by an indenture made between Hunt of the one part, and Thomas Rogers of the other part, Hunt demised to Rogers the said close, to wit, the said mill, manufactory, yard, and premises by way of mortgage, together with the said fixtures, engines, machinery, and utensils, goods and chattels, to hold the same for all the residue then unexpired of the said term therein, except the last day thereof, subject to a proviso for redemption. That Rogers afterwards entered and became possessed, and thereupon afterwards, and before the bankruptcy of Hunt, and whilst Rogers was so possessed of the said term so to him thereof granted as last aforesaid, which was then still undetermined, and before any of the said times when, &c., to wit, on the 27th of June, 1840, by a certain memorandum of agreement, in writing, then made and signed by each of them, the said Rogers and Hunt, and the plaintiff, it was

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agreed that the said Rogers and Hunt should grant and execute to the plaintiff a lease of the said mill, manufactory, yard, and premises, in the declaration mentioned, for all the residue then to come and unexpired of the said term of seventeen years, wanting fourteen days from the said 25th of December, 1839, granted by the said J. Freeman to the said Hunt as aforesaid, less three days of the said term, at the yearly rent of 400*l.*, and the plaintiff did thereby agree to accept such lease, and to execute a counterpart thereof. And it was thereby further agreed, that they, the said Rogers and Hunt, should bargain and sell to the plaintiff; and that he, the plaintiff, should purchase, and he did thereby then buy of them, and they did thereby then sell to him, the said fixtures, engines, machinery, and utensils, goods and chattels, at and for a certain price, or sum of money, to wit, 500*l.*, to be therefore paid by the plaintiff to the said Hunt and Rogers, as by the said memorandum of agreement, reference being thereunto had, will appear. And that after the making of the last-mentioned agreement, and before the bankruptcy of the said Hunt, and before either of the times when, &c., to wit, on the said 27th of June, 1840, he, the said plaintiff, in pursuance and under and by virtue of such agreement, and by and with the consent and direction of the said Rogers and Hunt, entered into and upon, and then became and was possessed of the said mill, manufactory, yard, and premises in the declaration mentioned; and also then took possession and became, and was possessed of, the said fixtures, engines, and machinery, in the introductory part of the said third plea, and in the declaration mentioned, and so remained and continued possessed of the same, until and upon the said times when, &c. Verification.

Special demurrer, on the ground, that it neither properly traversed, nor confessed and avoided, any of the matters alleged in the said third plea. That if it was intended as a traverse of any of those matters, it should have concluded to the country, instead of with a verification; and, on the other hand, if it was intended to be in confession

and avoidance of the said plea, it did not sufficiently confess the same, or give any sufficient colour to the defendants. That the said replication was an argumentative denial either of the possession of the said Hunt, at the time he became a bankrupt, of the said mill, manufactory, yard and premises, fixtures, engines and machinery, or of the defendants' possession thereof, as his assignees, at the said several times when, &c. That the said replication set up and shewed a possession in the plaintiff of the said mill, manufactory, yard and premises, fixtures, engines, machinery and utensils, commencing before the bankruptcy of the said Hunt, and continuing up to and until the said alleged times when, &c., which possession was repugnant to and inconsistent with the possession of the said Hunt at the time of his bankruptcy, and of the defendants as his assignees, since the bankruptcy of the said Hunt; yet, nevertheless, the said replication did not deny, or otherwise than by argument or inference, the said possession of the said Reuben Hunt, or of the defendants as his assignees. Joinder.

Manning, Serjt., supported the demurrer.

Channell, Serjt., supported the replication. [The argument on the questions decided by the Court are so fully stated in the judgment, that it is not thought requisite here to detail them.]

Cur. adv. vult.

TINDAL, C. J.—The plaintiff declared in trespass for breaking and entering his mill, manufactory, &c., and taking his fixtures and other goods and chattels. The third plea to this declaration stated a title in one Reuben Hunt, as sub-lessee of the premises for a term of years; and that Hunt, becoming bankrupt before the lease expired, the defendants, as his assignees, before the said time when, &c., accepted the lease and entered upon the mill, goods and

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chattels, &c., and thereby became possessed of the same, (the plea giving colour to the plaintiff in order to avoid any formal objection on that ground.) The replication to this third plea (upon which the question before us arises) was, in substance, that Hunt, before his bankruptcy, made a sub-lease to Rogers, by way of mortgage of the said mill, manufactory, &c., together with the fixtures, machinery, goods, and chattels, under which sub-lease Rogers entered and became possessed of the mill, manufactory, fixtures, &c., for the term so to him granted; and that afterwards and before the bankruptcy of Hunt, and whilst Rogers was so possessed for the term, which is still undetermined, by an agreement in writing between Hunt, Rogers, and the plaintiff, it was agreed that Rogers and Hunt should grant an under-lease to the plaintiff, and that they, Rogers and Hunt, should sell, and the plaintiff should buy, the fixtures, machinery, goods, and chattels at a certain price; under which agreement the plaintiff, with the consent of Rogers and Hunt, before Hunt's bankruptcy, entered and became possessed of the said mill, &c., and took possession and became possessed of the fixtures, engines, and machinery in the introductory part of the third plea mentioned.

To this replication, the defendants demurred specially for the causes by them assigned; and upon the argument before us, the principal objection insisted upon was, that the replication was ambiguous and double,—ambiguous, because it left the defendants in doubt whether the plaintiff meant to rely on an agreement by Hunt or an agreement by Rogers with the plaintiff; and that the replication was double, because (as it was contended) the defendants could not traverse at the same time both the mortgage to Rogers and also the subsequent agreement between Rogers and Hunt with the plaintiff; and further, that if the defendants traversed the mortgage to Rogers alone, and such traverse were found for the defendants, the plaintiff might still move for judgment non obstante veredicto, inasmuch as the mortgage to Rogers being out of the way, there would be

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nothing to prevent the subsequent agreement to demise the premises and to sell the goods to the plaintiff from having its full operation, as an agreement by Hunt alone; and if on the other hand the defendant should traverse the agreement between Rogers and Hunt and the plaintiff, and succeed upon such traverse, still it would appear that they, the defendants, had no right either to the possession of the mill and other premises, or of the goods, which possession was in Rogers by virtue of the mortgage to him, and his entry and possession under the same. But we think the defendants' objection ought not to prevail. This is an action, not only for the breaking and entering, but also for the taking of the goods and chattels of the plaintiff. The defendants have justified the whole trespass, both the breaking and entering, and the taking the goods, under their right to the possession as assignees of Hunt a bankrupt. The plaintiff again, in his replication, sets up a prior right to the whole, that is, both to the possession of the premises and of the goods and chattels under a mortgage of the premises, and of the goods and chattels to Rogers, and an agreement between Rogers the mortgagee and Hunt the mortgagor, for a sub-lease to the plaintiff of the premises and fixtures, and for an absolute sale to him of the goods and chattels. This forms one complete title in the plaintiff to the possession of the whole, that is, both of the place in which, &c., and of the goods and chattels; and there can be no reason, as it seems to us, why he should not be at liberty to plead his title to the whole, as it really exists. It may be true, that in consequence of the title being pleaded as it is, the defendants cannot take issue on the demise to Rogers; but the reason why they cannot do so is, that even though nothing passed by that demise, the plaintiff would still have a sufficient title, under the agreement, between him and Hunt and Rogers, and the issue taken on the mortgage would be immaterial, inasmuch as it would leave the plaintiff's title unanswered. It may also be true that the defendants could not rely simply on a

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denial of the plaintiff's title under the agreement between Rogers, Hunt, and Pim, inasmuch as the demise to Rogers being unanswered, the defendants would still appear, on the whole record, to be trespassers; but we see no reason why the defendants should not be at liberty to include in one traverse the whole title as it is pleaded, that is, the mortgage to Rogers and the subsequent agreement made with the plaintiff, as both together constitute but one title, and unless both are denied, no answer is given to the plaintiff's replication. Such a traverse cannot, we think, be open to objection on the score of duplicity, for duplicity implies the setting up of two answers to the same subject-matter of allegation; whereas the traverse in this case would only set up one entire answer to the replication; and that it is one entire answer only, appears clearly from this consideration, that if either branch of it were omitted, the remainder alone would furnish no answer to the replication. Such a traverse falls within the principle on which the case of *Bell* v. *Tuckett* (*a*) rests, and this consideration appears to us to obviate the whole of the difficulty set up on the part of the defendants. And as to the objection, that if the defendants took issue on the mortgage only, and succeeded upon it, the plaintiff would be entitled to the judgment of the Court non obstante veredicto, it appears a sufficient answer, that the plaintiff is never entitled to such judgment upon the ground of the insufficiency of the defendant's pleading (where such plea or rejoinder is found for the defendant and against the plaintiff), unless the plea or rejoinder implies an admission of the plaintiff's title, which a traverse by the defendant never does; *Gwynne* v. *Burnell* (*b*). And the decision of this Court in the case of *Hitchcock* v. *Humfrey* (*c*) does not appear in any way inconsistent with the doctrine above laid down, for in that case the traverses by the defendant were altogether imma-

(*a*) 4 Scott, N. R. 402; S. C. 3 M. & G. 785; 1 Dowl. 458, N. S.

(*b*) 1 Scott, N. R. 711; S. C. 6 Bing. N. C. 453.

(*c*) 6 Scott, N. R. 540; S. C. 5 M. & G. 559.

terial traverses, being traverses of allegations in the declaration which were unnecessary. The allegations themselves, therefore, might be considered as struck out of the declaration, and with them the traverses and the finding thereon must fall to the ground. In fact, the judgment non obstante veredicto appears to be only one species of a judgment by confession, where the plea confesses a right of action, but sets up an avoidance bad in substance, which cannot hold good as to a material traverse, whether of the whole or a part only of the plea.

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Upon the third plea, therefore, the Court gives judgment for the plaintiff.

Judgment for the Plaintiff.

COURT OF EXCHEQUER.

Hilary Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

1 C. 15 M. & W. 189

1846.

Caines *v.* Smith.

A declaration alleged, that in consideration that the plaintiff promised to marry the defendant, the defendant promised to marry the plaintiff; that the plaintiff has always been ready and willing to marry him; yet the defendant, not regarding his promise, married another woman.

Plea, that defendant was not requested by plaintiff to marry her: *Held*, on special demurrer, that the plea was bad, and the declaration good, although the latter contained no averment that a reasonable time had elapsed.

ASSUMPSIT. The declaration stated that in consideration that the plaintiff, being then sole and unmarried, at the request of the defendant, had then promised the defendant to marry him, the defendant, he the defendant, then promised the plaintiff to marry her the plaintiff. And the plaintiff avers that she, confiding in the said promise of the defendant, hath always from thence hitherto remained and continued and still is sole and unmarried, and hath been for and during all the time aforesaid and still is ready and willing to marry him, the defendant, whereof the defendant hath always had notice. Yet the defendant, not regarding his said promise wrongfully and injuriously married a certain other person.

Plea. That the defendant was not at any time, before the commencement of this suit, requested by the plaintiff to marry her. Verification.

Special demurrer, assigning for causes, that the defendant by his said plea, had traversed matters not alleged nor necessarily implied by the said declaration, and that the plea raised an immaterial issue.

Peacock, in support of the demurrer. The plaintiff was not bound to allege a request to marry when the defendant had put it out of his power to do so by marrying another person. The same point was decided a few days ago by the Court of Queen's Bench in the case of *Short* v. *Stone* (*a*). [He was then stopped by the Court].

Hawkins, contrà. The declaration is bad. It is not alleged that a reasonable time since the making of the promise has elapsed, and consequently no breach has yet taken place. Though it appears that the defendant has married another woman, yet he may still be in a condition to perform his promise when the time arrives. His present wife may die before the expiration of a reasonable time. It is not even averred that she is now alive. In *Comyn's Dig.* tit. "*Covenant*" (E 3.) it is said that "a covenant shall not be broken, if a man does an act which by consequence may be a breach, if the breach does not actually follow."

POLLOCK, C. B.—There must be judgment for the plaintiff. If a man contract to deliver goods at a certain time, and before that time arrives, either destroys the goods or does any other act which puts it out of his power to deliver them, there is no occasion to request him to deliver them. Putting a reasonable construction on this declaration, there appears in substance a breach of contract. As the defendant has pleaded over, it is the same as if the objection had been taken on general demurrer, and in that view the declaration is certainly good.

ALDERSON, B.—I am of the same opinion. Why are we to presume that the wife will die before the expiration of a reasonable time, or in the lifetime of her husband? If we are to make any presumption at all, it would be in favour of the existing state of things. The declaration shews that the

(*a*) Hilary Term, 1846.

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CAINES v. SMITH.

defendant has put it out of his power to perform his contract and that is sufficient.

PLATT, B., concurred.

Judgment for Plaintiff.

SC. 15. PNW. 78. RENNIE and Another *v.* BERESFORD and Others.

In an action by a surveyor, it is sufficient to state in the bill of particulars that the plaintiff claims a certain sum in respect of a survey between certain places, including travelling expenses and assistance, without specifying the number of fields surveyed, the time he was engaged, and the number of persons employed, or distinguishing what is charged for his own time and labour, from the charge for that of others. But such particular must specify the sums paid for the defendants' use.

A party who successfully shews cause in the first instance, is entitled to costs in cases where a rule nisi would, if granted, have operated to his prejudice.

THIS was an action of assumpsit against the managing committee of the Leeds and Carlisle Railway Company for work done, money paid, &c., by the plaintiffs, as engineers and surveyors. The bill of particulars was as follows:—

"This action is brought to recover the sum of 6,855*l.*, the balance of the undermentioned account delivered by the plaintiffs to the defendants in the month of December last, with interest thereon at the rate of 5*l.* per cent. per annum from the 1st of January last until payment.

Leeds and Carlisle Railway Company.

"To Messrs. George and John Rennie.

1845.	Between 18th September and 30th November. To preliminary survey and examination of the country between Leeds and Carlisle, in order to determine the best line, including travelling charges and assistance - - -	£250 0 0
1845.	Between 27th September and 30th November. To personally examining the country between Leeds and Carlisle; making sundry trial sections; laying out the main line, finding surveyors, levellers and engineers; superintending the same; meeting the solicitors; arranging with them, and assisting at the reference; taking all the cross sections of the roads, and making the proposed alterations therein; getting out the finished plans and sections; furnishing the solicitors with tracings to take their reference; meeting solicitors, and putting numbers on the plans to correspond with the	

4 D.L., 100-693.

reference; laying out all the gradients and curves on the plans and sections; superintending the engravings, and furnishing the engraver from time to time with the requisite plans and sections; correcting the proofs; sundry meetings with the chairman of the committee of selves and assistants; and generally directing and superintending all the different departments of surveying, levelling, engineering and engraving, &c., including tavern bills, travelling charges, and office expenses -	8,980	0	0
To laying out, surveying, and levelling between Bramholt Tunnel on the Leeds and Thirsk Railway, passing by Otley towards Bolton, according to the original intention of the committee, ten miles, at 55*l.* - -	550	0	0
To surveying, levelling, and laying out, an alteration in the line near Bolton, to avoid the opposition of the Duke of Devonshire, four miles, at 55*l.* - - -	220	0	0
To surveying, levelling, and laying out a deviation of the line between Kettlewell and Thwaites Bridge, in order to adopt the atmospheric principle by order of the board, sixteen miles, at 55*l.*	880	0	0
To ditto ditto, and the deviation to avoid the second tunnel at Bainbridge, including all the necessary documents fit for deposit; furnishing solicitors and engravers, with plans, &c., completed in the same manner as the main line, six miles at 105*l.* - - -	630	0	0
To Mr. Arrowsmith, the engraver's bill - -	1,345	0	0
	12,855	0	0
By cash on account at various times - -	6000	0	0
	6,855	0	0

Interest on 6,855*l.* from the 10th day of January, 1844, at 5*l.* per cent. per annum until payment.

Above are the particulars of the plaintiffs' demand in this action," &c. "Signed, &c."

A summons was taken out for further and better particulars, and was heard before *Alderson*, B., who directed that further particulars should be furnished of the sums of

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money alleged to have been paid by the plaintiffs for the defendants' use, but refused to make any order as to the other portion of the plaintiffs' claim. The plaintiffs, in their amended particulars, stated the sums paid to workmen, but did not give an account of the tavern bills.

Montague Smith now moved for a rule, calling on the plaintiffs to shew cause why they should not deliver further and better particulars. Unless the case of a surveyor employed by a railway company is distinguishable from that of any other individual who does work and expends money for another, this bill of particulars is insufficient. [*Alderson*, B.—The nature of the particular must vary according to the mode of dealing, and the manner of keeping accounts in the particular business. In a case like this, you cannot expect a surveyor to state the precise number and extent of the fields which he has surveyed.] The second item charges one gross sum for surveying, travelling expenses, and assistance, without stating how many days the plaintiffs were occupied, how many persons were employed, how much is charged in respect of the plaintiffs' own time and labour, and how much for the time and labour of others; neither is it stated how much is charged for labour generally, and how much for money out of pocket. An attorney's bill of costs must specify each particular item of charge. [*Alderson*, B.—The case of an attorney's bill is peculiar, and the reason is, that the bill is liable to taxation, so that the propriety of each item has to be determined by the judgment of others.] The object of a bill of particulars is to inform the defendant of what the plaintiff will go for at the trial, in order that the defendant may see whether there is any part of the claim which he is unable to resist, and pay that amount into Court. In this case the object of the defendants is, to see whether it would be advisable to refer the claim to arbitration. [*Alderson*, B.—If that is your object, you do not want such minute particulars. *Pollock*, C. B.—Would you be satisfied with a bill for surveying so many miles at so much per mile?] No,

the plaintiffs should separate their own personal charges as engineers from what they expended in paying others. It appears, from the following letter from the plaintiffs' attornies to the defendants' attorney, that the plaintiffs are capable of furnishing a better account of the charges, but refuse to do so. "We have every disposition to give you all the information in our power, but considering that the chairman and directors, being in possession of all the information you ask, pledged themselves to the proprietary to resist Messrs. Rennie's claim; we do not feel that we should be justified in handing you the accounts you ask for, without a clear understanding that you will pay the amount to Messrs. Rennie. . . . . Messrs. Rennie have shewn to the directors weeks ago the extent to which they are out of pocket. They propose to the directors to pay them that amount, and to leave their claim for service beyond those disbursements to ulterior discussion." Besides, the plaintiffs have not complied with the order of *Alderson*, B., for better particulars of the money paid.

Sir *John Bayley*, who appeared to shew cause in the first instance was not called upon.

POLLOCK, C. B.—This application comes by way of appeal from the decision of my Brother *Alderson* at Chambers, but I think that the learned Judge exercised a proper discretion, and that no rule ought to be granted. There is a distinction between the explanation of a charge made in a bill of particulars, and the charge itself. For instance, if in this bill the matters, such as stationery, travelling expenses, &c. were of themselves, and by themselves the distinct subject of charge, no doubt there ought to have been particulars given of each, but that is not so: the charge is general, and the matters inserted are merely in explanation of the charge. I propose to lay down no rule in the case of an engineer different from that of a house-builder, or a coachmaker, or any other person. Suppose a coach-

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maker delivers a bill of particulars including all parts of the carriage, and stating certain contracts for workmen employed in building it, and that the whole is covered by the sum of 315*l.* no Judge would order that he should give particulars of every item, as, so much for the wheels, so much for the painting, and so much for the fitting up. The same rule applies to a surveyor and engineer: he must give that information which will enable the party to pay money into Court, and anticipate what he is to meet at the trial. In the present case Mr. *Smith* says, that he would not be satisfied with a statement of charges at so much per mile, but I can well understand that such a particular would be perfectly satisfactory, for the only question before the jury would be, whether the charge so made was reasonable. It is said that the defendants do not know by these particulars how many miles the plaintiffs mean to charge for, but there is the terminus a quo, and the terminus ad quem, and any engineer, by looking at a map, and taking the distance between the two points, would be able to say whether the charge was fair and reasonable or not. As to the other point, of the Judge's order for further particulars of the sums paid not having been duly obeyed; the proper course is to go before him again.

ALDERSON, B.—If there be any objection to the mode of compliance with the order which I made at Chambers, that is a proper matter to go to Chambers again: for application should be made to the Judge to enforce his own order. —It is only proper to come to the Court where you deny the exercise of the Judge's discretion at Chambers. As to the other point, I am of the same opinion, I think that the plaintiffs have given all reasonable and practicable information, and if we were to require more, it would be making the bill of particulars a trap for the plaintiffs in order that they might be caught by giving a minute specification. The object of a bill of particulars is to control the generality of the declaration, but in nine cases out of ten, particulars are

applied for at Chambers to entrap the plaintiff by confining him within certain limits, and we should be careful not to allow plaintiffs to be tied up too tightly by such means. In the present case you direct a man to survey the whole of the land for a railway, is it to be expected that he shall tell you how often he lifted up his theodolite? He delivers his account for tavern expenses, is he to have no opportunity of proving those expenses at nisi prius, unless he tells you before hand how many bottles of wine he has had? It would be most unreasonable not to allow the plaintiff to tell you generally what he is going for, and to prove it by general evidence before the jury.

ROLFE, B. concurred.

Sir *John Bayley* asked for the costs of appearing to shew cause in the first instance.

Montague Smith submitted that a party who appeared to shew cause in the first instance was not entitled to costs. He cited 2 *Chit. Arch. Prac.* 1194, *7th ed.*; *Fitch* v. *Green* (*a*), *Read* v. *Speer* (*b*), *Begbie* v. *Grenville* (*c*).

POLLOCK, C. B.—The general rule is certainly as stated in those cases, but there the rule nisi would not, if granted, have operated as a stay of proceedings, or have prejudiced the opposite party, if he neglect to shew cause in the first notice. But this case is distinguishable, for the rule, if obtained, would have stayed the proceedings, and have deprived the plaintiffs of the opportunity of trying the case at the next sittings. So far it might have prejudiced them: they were, therefore, interested in instructing counsel to shew cause in the first instance, and it is reasonable therefore that they should be allowed the costs of that step.

(*a*) 2 Dowl. 439.

(*b*) 5 Id. 330. See a different report of this case in 2 M. & W. 76.

(*c*) 3 Dowl. 502.

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ALDERSON, B.—Where delay would be prejudicial to a party he is justified in coming to prevent that delay.

Rule refused. (*a*)

(*a*) With costs, to be costs in the cause.

The following case was also decided in the same Term.

1 C. 15 M. & W. 76.

HIGGINS *v.* EDE and Another.

See 4 M. & G. 101. — " — 693

IN an action brought to recover the sum of 3,774*l.* 4*s.*, for work, labour, and materials, the following bill of the particulars of the plaintiff's demand was delivered with the declaration.

"This action is brought to recover the amount of the following items of account:—

		£	s.	d.
1845, June.	A preliminary survey of the Derby, Uttoxeter, and Stafford Railway, including the examination of the country; taking trial sections; attending public meetings at Uttoxeter; attending committees and other meetings; tavern and travelling expenses - -	343	0	0
Nov. 4.	The survey of thirty-six and a half miles -	1460	0	0
	The survey of the Burton branch; also the alternative line B from Finden; also alternative line C to Baswick; also alternative line D to Grand Junction Railway, ten and a half miles in all - - - -	630	0	0
Nov. 7 to 30.	Time and expenses of surveyors, and assisting the solicitor with books of reference, both in the country and in London -	320	0	0
	Engraving thirty-three plates of plans -	825	0	0
	Paid for copper-plates - - -	129	0	0
	Printer's account - - -	67	4	0
		£3,774	4	0

"Above are the particulars of the plaintiff's demand in this action, &c."

"Signed, &c."

A summons was taken out for further and better particulars, and was heard before *Alderson*, B., who refused to make any order.

1846.

HIGGINS v. EDE and Another.

E. James now moved for a rule, calling on the plaintiff to shew cause why he should not deliver further and better particulars. The affidavit of the defendants' attorney states that the defendants are sued as provisional committee men of the Derby, Uttoxeter, and Stafford Railway Company, of which the plaintiff was engineer, and that without further particulars they could neither proceed with the defence to the action, or know what amount to pay into Court: that the deponent never saw any of the work done, or any of the books of reference. The present bill of particulars mentions a survey, but does not state how much time was expended on it, or what number of persons were employed about it, or what rate per mile is charged. The trial sections should have been particularly described, in order that the defendants might have the work examined by engineers. Then as to the books of reference, it is not said how many were delivered, nor what is the nature of them, nor when they were delivered.

POLLOCK, C. B.—There is no ground for this application. Here is a gross charge for work done as an engineer, embracing many items, and the case resembles that of a claim for goods sold, where it is sufficient to state generally that the action is brought for goods supplied. It is contended that the plaintiffs ought to state how much per mile he charges for the survey; in that, however, there would be some difficulty, as the trouble might be more or less in different places. As to the books of reference, persons on the provisional committee of a railway must know very well that the standing orders of Parliament require such books to be deposited with parish clerks and clerks of the peace for inspection. If the defendants can swear that they know nothing about these books, they can go before a Judge at Chambers with fresh affidavits.

PARKE, B.—The plaintiff has furnished an account of the general nature of his demand, and that is sufficient. He says that he claims in respect of a survey; he gives the number of miles over which it extends, and the branches on which it was made. With regard to the books of reference, the defendants, to whom they were supplied, must be taken primâ facie to have them in their possession, and, consequently, to know both the nature of them, and how many there were.

PLATT, B., concurred.

Rule refused.

1846.

Sc. 15 Jn 9 W. 146

The QUEEN *v.* The Sheriff of MIDDLESEX.

An attachment having issued against the sheriff for not bringing in the body, the same was ordered to be set aside, on payment of costs and perfecting special bail. Those terms not having been complied with, a habeas issued directing the coroner to bring up the body of the sheriff. The under-sheriff then paid to the plaintiff the amount of the penalty of the bail bond (being double that of the debt) and costs. *Held*, that the plaintiff was only entitled to retain the sum indorsed on the writ and costs.

AN action had been brought to recover the sum of 61*l.* 1*s.*, and a capias issued by virtue of a Judge's order, which writ was indorsed to levy 61*l.* 1*s.*, besides costs. The sheriff was ruled to bring in the body, and having neglected to do so, an attachment issued against him, but was ordered to be set aside, on the terms of payment of costs and perfecting special bail. Those terms not having been complied with, owing to a mistake of the sheriff's officer, a writ of habeas issued directed to the coroner, commanding him to bring up the body of the sheriff. The sheriff thereupon took out a summons, calling on the plaintiff to shew cause why upon the sheriff complying with the previous rule, and paying the costs of the habeas, all further proceedings under that writ should not be stayed. Before that summons was returnable, the under-sheriff paid to the plaintiff's attorney the sum of 122*l.* 10*s.* (being the amount of the penalty of the bond) and costs. A rule was thereupon obtained, calling on the plaintiff to shew cause why he should not refund the sum paid by the sheriff after deducting the amount of the plaintiff's debt and costs.

Montagu Chambers shewed cause. The plaintiff is entitled to retain the whole amount paid by the sheriff. In *Archbold's Practice* (*a*) it is said, "that when the proceedings are against the sheriff, the Court will not in general relieve him, if it appear that he has been guilty of a breach of duty, as by letting the defendant out of custody without taking from him such a bail bond as is required by the statute." Also, "if the attachment be not set aside, the plaintiff can be discharged from it only by payment of the whole debt and costs, in the original action, to the extent of the penalty of the bail bond (and not merely the sum sworn to and

(*a*) Page 571, 7th ed.

costs), and also the costs of the attachment (*a*)." [*Pollock*, C. B.—That does not apply to the present case, which is an application to recover back money which the sheriff was not bound to pay, and which the plaintiff has no right whatever to retain.] The sheriff having paid the money with full knowledge of all the facts, is not entitled to recover it back.

Jervis appeared to support the rule, but was not called upon.

POLLOCK, C. B.—The rule must be absolute. All that the plaintiff is entitled to retain is the amount indorsed on the writ and costs. The sum paid by the sheriff cannot be regarded as a penalty for misconduct. He was only bound to place the plaintiff in the same situation as if special bail had been put in and perfected in due time, and he does so by paying the sum indorsed on the writ and costs.

PARKE, B.—I am of the same opinion. The sheriff was bound to put the plaintiff in the same situation as if he had done his duty in the first instance. If he had brought in the body of the defendant when ruled so to do, the defendant would have been entitled to his discharge on payment of the sum indorsed on the writ, and 10*l.* for costs. The rule of Court of Hilary Term, 2 Wm. 4, pl. 21, orders that "bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance." The sheriff was liable to the plaintiff for not putting in and perfecting bail; he is, therefore, responsible to the same extent as the bail, that is, for the amount of the debt and costs.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

(*a*) Page 572, 7th ed.

1846.

Sc. 15. M. W. 149.

BAKER *v.* JUPP.

A rule to discontinue on payment of costs is no stay of proceedings; therefore where a plaintiff served a rule to discontinue, with an appointment to tax costs, and on the following day the defendant obtained a rule absolute for judgment as in case of a nonsuit: *Held*, that the judgment was regular.

IN this case the plaintiff, who had failed to try the cause pursuant to a peremptory undertaking, took out a rule to discontinue upon payment of costs, and served the same, together with an appointment to tax the costs about twelve o'clock on Saturday the 10th January. On the following Monday the defendant obtained a rule absolute for judgment as in case of a nonsuit. A rule nisi having been obtained to set aside this judgment as irregular,

Bramwell shewed cause. The rule to discontinue was no stay of proceedings; until the costs were taxed and paid it was wholly inoperative, and the defendant was entitled to move for judgment as in case of a nonsuit. (The Court called on)

Hawkins to support the rule. It was irregular to move for judgment as in case of a nonsuit, after service of the appointment to tax costs under the rule to discontinue. *Cooper* v. *Holloway* (*a*), decided that where a plaintiff has served a rule to discontinue, and the costs are taxed, but not paid, the plaintiff is not entitled to judgment as in case of a nonsuit. The form of a rule to discontinue has been altered by the rule H. T., 2 Wm. 4, 106, which orders, that "to entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation, defendant shall be at liberty to sign a non pros." Under that form of rule, the defendant obtained an undertaking which enabled him to insist upon the Master proceeding to tax the costs, and if they were not paid he should have signed judgment of non pros. The rule

(*a*) 1 Hodges, 76.

having prescribed the mode of putting an end to the action, the defendant was not justified in taking a circuitous course. [*Platt*, B.—There cannot be a non pros after issue joined.] The defendant would still have his remedy, as the rule to discontinue contains an undertaking to pay the costs. Even under the old practice, when the costs were taxed, and judgment of discontinuance entered up, it related back to the day when judgment of discontinuance was obtained, and the action was considered as discontinued from that time; *Brandt* v. *Peacock* (*a*). [*Parke*, B.—There was nothing to prevent the defendant from having his rule absolute for judgment as in case of a nonsuit: all you gave him was an undertaking, which he was not bound to enforce. Consider how the case stood at the time he moved for judgment, there was a rule to discontinue on payment of costs, and an undertaking to pay them which the defendant was not bound to accept, therefore he has a right to his judgment.] *Whitmore* v. *Williams* (*b*), only decided that serving a rule to discontinue, does not of itself discontinue an action without an appointment to tax. At all events the defendant should not have moved until it was known what step would be taken on the rule to discontinue. In *Tiley* v. *Hodgson* (*c*), where a copy of a writ of summons was served on the 6th January, and on the 13th, the plaintiff received notice of a rule nisi to set it aside for irregularity, and that the rule would be drawn up at the opening of the office, on the following morning, and in the afternoon of the 14th the plaintiff entered an appearance and filed his declaration, and two hours afterwards the rule was served; it was held that the defendant was not precluded from objecting to the writ, and *Pollock*, C. B., observed, "that where a party receives notice of a rule, and will, notwithstanding, take a step, he must do so at his peril." [*Pollock*, C. B.—That case is very different from the present; there the rule was pronounced by the Court, and if the party had been in

(*a*) 1 B. & C. 649; S. C. 3 D. & R. 2.

(*b*) 6 T. R. 765.

(*c*) *Ante*, Vol. 2, p. 655; S. C. 13 M. & W. 638.

1846.

BAKER v. JUPP.

Court to hear it, it would have been just as binding as if a copy had been served. *Parke*, B.—The only question there was, whether or no the application was in time. It was in time; only the rule could not be served on account of the pressure of business in the office: it operated as a stay of proceedings from the time it was granted.]

POLLOCK, C. B.—The Master reports that a rule to discontinue, on payment of costs, is no stay of proceeding. The present rule must be discharged.

Rule discharged.

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1 C. 14 Dec W. 873. BRADLEY *v.* BARDSLEY and Another.

To a declaration on a promissory note, dated 15th of April, 1845, the defendants pleaded, that at the time the note was made and signed by them, they promised to pay the sum therein mentioned, without specifying any time for payment: that after the note was made and issued, and was complete and delivered to the plaintiff, the note was, by consent of the defendants, *but without the same being restamped*, altered by the plaintiff in a material part, by making the same payable on or before the 15th of April, 1845.

Replication: that before and at the time of making and issuing, and completing the note, and before the alteration was made, it was meant and intended by the plaintiff and the defendants, that the note should be payable on the 15th of April, 1845, but by mistake the note was made and issued, and complete, without specifying any time for payment: that the alteration was made for the purpose, and with the intent of correcting the mistake.

Rejoinder, that before and at the time of the making of the note, it was not meant and intended that the note should be payable on the 15th of April, 1845.

Held, that the rejoinder was bad, for putting in issue the intention of the parties *before*, as well as *at*, the time of making the note.

Held also, that the plea was bad, for not shewing that the alteration was made under circumstances which rendered the note invalid unless restamped.

Semble, that the replication was also bad, for not shewing that the note was not complete at the time of the alteration.

Quære, whether the Stamp Acts can be pleaded, unless the want of a stamp renders the instrument void?

DEBT by payee against makers of a promissory note, dated 15th April, 1844, for payment of 145*l.* 4*s.* on or before the 15th of April, 1845.

Plea: That by the said note at the time the same was made and signed by the defendants, to wit, on the 15th of April, 1843, the defendants promised to pay the said sum of money therein mentioned without thereby specifying any time for the payment thereof, and the defendants did not thereby then promise to pay the said sum on or before the said 15th of April, 1845, or at or within any other day or

time whatsoever: that after the note was made and issued, and was complete and delivered to the plaintiff and not before, to wit, on the said 15th of April, 1843, the note was by consent of them, the defendants, but without the same being restamped, altered by the plaintiff in a certain material part, that is to say, by making and expressing the same to be payable on or before the 15th of April, 1845, and by the insertion in the said note of the words "and to be paid on or before the 15th of April, 1845," which words, before such alteration, were not inserted or contained in the said note. Verification.

Replication: that before and at the time of making and issuing and completing and delivering of the note to the plaintiff and before the said alteration was made, it was meant and intended by the plaintiff and the defendants, that the note should be payable on or before the 15th of April, 1845, and that the words so inserted in the said note should be inserted therein; but by the mistake of the plaintiff and the defendants the note was made and issued, and was complete and delivered to the plaintiff without thereby specifying any time for payment of the said sum of money: that the alteration was made with the intent and for the purpose of correcting the said mistake and making the note payable and in form according to the said meaning and intention of the plaintiff and the defendants, and with their consent, and within a reasonable time after the making of the said note, and before the same had been negotiated by the plaintiff. Verification.

Rejoinder: that before and at the time of the making and issuing and completing and delivering of the note to the plaintiff and before the said alteration was made, it was not meant and intended by the plaintiff and the defendants that the note should be made payable on or before the 15th of April, 1845, or that the words so inserted and added in and to the said note should be inserted or added, modo et formâ. Conclusion to the country.

Special demurrer, assigning for causes (amongst others), that the rejoinder put in issue immaterial matter, inasmuch

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as it traversed and denied that it was meant and intended, before the completing, issuing, and delivering the said note, that it should be made payable as alleged in the replication.

Willes, in support of the demurrer. First, the rejoinder is bad in putting in issue immaterial matter. [*Parke*, B.—It is certainly immaterial what the parties intended before the making of the note]. Secondly, the plea is bad. Assuming that the Stamp Act can be pleaded, the present plea does not raise the defence. It alleges that the bill was not restamped but there is no statute which authorizes the restamping of bills. If the plea is not good under the Stamp Act, it affords no answer whatever; for an alteration with the consent of both parties would not avoid the instrument at common law; *Com. dig.* "Fait" (F.) But it is submitted that the Stamp Act cannot be pleaded, unless it render the unstamped instrument void. *Lazarus* v. *Cowie* (*a*) was decided on the ground that the 19th section of the 55 Geo. 3, c. 184, expressly prohibits the re-issuing of a bill after it has been paid, and inflicts a penalty on any person so doing. The only effect of the stamp law, is that an unstamped instrument cannot be given in evidence.

Cowling, contrà. The plea is good. The 31 Geo. 3, c. 25, s. 19, enacts that no bill of exchange or promissory note "shall be pleaded or given in evidence," unless duly stamped. At all events the plea is good on general demurrer, as it shews that the note was complete at the time of the alteration; if the fact were otherwise, it should come from the plaintiff by way of replication. The authorities shew that, if the instrument is once complete, it cannot be altered without being restamped; *Bathe* v. *Taylor* (*b*); *Downes* v. *Richardson* (*c*); *Jones* v. *Jones* (*d*); *Kershaw* v. *Cox* (*e*); *Byrom* v. *Thompson* (*f*).

(*a*) 3 Q. B. 459; S. C. 2 G. & D. 487.
(*b*) 15 East, 412.
(*c*) 5 B. & A. 674; S. C. 1 D. & R. 332.
(*d*) 1 Cr. & M. 721.
(*e*) 3 Esp. 246.
(*f*) 11 A. & E. 31; S. C. 3 P. & D. 71.

[The Court called on]

Willes. The plea does not shew that the note might not be rendered available by being stamped. It might possibly fall within the cases enumerated in the 3rd section of the 37 Geo. 3, c. 136, which enables the commissioners, within sixty days to stamp instruments, where the omission has not arisen from an intention to defraud the revenue; or it may fall within the provisions of the fifth section, which enacts, that bills of exchange, if on stamps of an equal or superior value, though of different denomination than the legal stamps, may be properly stamped, on payment of the duty and a penalty. The note in question may have had an agreement stamp as well as a bill stamp. The clause which prohibits unstamped instruments from being received in evidence, is not only in the above statute, but also in the 5 Wm. & M. c. 21, s. 11.

[The Court then called on]

Cowling. If, as suggested, the note had been stamped with an agreement stamp, it could not be said to be complete. [*Parke*, B.—The plea cannot be good, if the note could by any means have been made available at the trial. At all events, the plea should have shewn, that at the time of the action brought, the note was not properly stamped. The Stamp Laws can only be pleaded as a good bar in cases, where the instrument cannot be restamped. *Alderson*, B. —There is nothing to shew that the note was not restamped since its alteration, and before action brought.] If the fact were so it ought to have been replied.

PARKE, B.—I am of opinion that the rejoinder is bad, it includes two things, namely, the intention of the parties before the making of the note, as well as at the time of making the note. Then with respect to the replication, it is clear that it ought to shew that the original instrument was not a binding instrument before the alteration took place. I doubt whether it does that, but as the plea is bad it is not necessary to give any opinion as to the sufficiency

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of the replication. The material words of the plea are, "without the same being restamped." At common law the plea would be bad, as the alteration was made with the consent of the parties; and even after the passing of the Stamp Acts, there might be an agreement to alter a bill, and it might be restamped. To make the plea good, it ought to appear that it was impossible to make an alteration in the instrument, and that it could not be restamped. Suppose the words, "without being restamped," are to be considered as meaning, "without being stamped with the proper duty;" then the only allegation is, that at the time the alteration took place the note was not duly stamped; but it might be stamped at the time of trial. In order to make a good plea, it ought at least to have been shewn that at the time of plea pleaded the note was not stamped; though I do not think even that would have done, as it might be stamped before the trial. The plea is, therefore, bad, as it does not shew those circumstances under which the note could not be restamped.

ALDERSON, B.—It seems to me that the plea is bad. If the alteration were such that it could not, at common law, be made without rendering the instrument void; or if any alteration, after a note was complete, would render it invalid, unless subsequently stamped, then the plea would be good. But if there be any case in which an alteration may be made at common law, and the instrument be still valid; or if, under any circumstances, the note can be restamped, then the plea is bad. If the law were, as Mr. *Cooling* contends, it would be a good plea in an action on an agreement, to plead that the agreement was not stamped at the time of making it. If the law were that no agreement could be enforced unless stamped at the time it was originally made, the want of a stamp might, perhaps, be a good plea; but if an agreement may be valid, although not originally stamped, it cannot be any answer to plead that fact. This plea does not shew that the alteration was made under circumstances which rendered the note invalid

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unless restamped. As to the replication, it is doubtful whether enough is stated to shew that the instrument, as originally drawn, did not fulfil the intention of the parties. An alteration may be made for the purpose of rendering an instrument for the first time available; but if once there be an available bill, the parties cannot alter it so as to make it another available bill. In that view I am not satisfied that the replication affords a good answer. The rejoinder is clearly bad, because it puts in issue more than need be proved.

ROLFE, B.—I am of the same opinion. The only difficulty arises from the words of the Stamp Act, which says that an unstamped instrument shall not be pleaded or given in evidence, or be "available." But under that provision it was never intended that the parties should set up as a defence that which is no answer at all. It should have appeared not only that the instrument was unstamped, but that under no circumstances could the note in this case have been made available.

PLATT, B., concurred.

Judgment for Plaintiff.

GEEVE *v.* GORTON.

1 C. & M. & R. 186

A cause having been set down for trial in Middlesex, and a rule obtained for a special jury, the parties agreed that the venue should be changed to London, and the cause tried by a special jury there, and that all costs occasioned by that arrangement should be costs in the cause. The cause came on for trial in London, and was referred to arbitration, the arbitrator to have the same power to certify as a Judge at nisi prius. The award was made on the 6th of August, and after the first four days of the following Term, the arbitrator certified for a special jury: *Held*, first, that the certificate was too late: secondly, that the successful party was entitled to the additional costs of the special jury occasioned by the change of venue from Middlesex to London.

THIS cause had been set down for trial in Middlesex, and a rule obtained for a special jury of that county, when the following agreement was drawn up and signed by the attorneys on both sides:—"We consent to the record in this

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cause being altered, by changing the venue from Middlesex to London, and to the same being now entered in the London list of causes, with a view to the cause being tried, if possible, during the present sittings in London; and we consent to all necessary alterations consequent on such change of venue being made in the record, and that jury process shall be issued, returned, and annexed to the record, as if the cause had been regularly set down and the record duly passed for the present sitting in London, and that the rule for a special jury shall be amended by directing the same to the sheriffs of London instead of to the sheriff of Middlesex, and that a special jury shall be thereupon summoned by the sheriffs of London; and that in the event of such special jury not being summoned by either party, then that the cause shall be tried by a common jury of London, as if no rule for a special jury had been obtained in the action; and unless the cause shall be tried, the same shall keep its place in the Middlesex cause list as at present entered, and that in the event of the cause not being tried during the present sittings in London, then that the record and jury process shall be altered and resealed, so that the cause shall be brought on for trial in Middlesex in due course. And we further consent that all costs of and occasioned by this arrangement, shall be costs in the cause, and abide the event. And we further consent, that either party shall be at liberty to draw up a Judge's order in the above terms, dated 26th June, 1845." The cause came on for trial at the next sittings in London, before *Pollock*, C. B., and a special jury, when a verdict was taken for the plaintiff subject to a reference: the arbitrator to have the same powers as a Judge at nisi prius, or at Chambers, and to make his award on or before the first day of the then next Michaelmas Term. On the 6th of August, the arbitrator made his award in favour of the defendant, and after the first four days of Michaelmas Term, application was made to the arbitrator to certify on the record that the case was proper to be tried by a special jury, which he accordingly did. It appeared by the affidavits, that the

costs of obtaining the special jury in London amounted to 16*l.*, but in Middlesex they would have amounted to 15*l.* only. The Master on taxation refused to allow either of those sums, on the ground that the arbitrator's certificate was invalid.

Webster now moved for a rule nisi to review the Master's taxation. Two objections were raised; first, that the certificate was not given immediately after the verdict: secondly, that the certificate was not given until after the arbitrator's authority had expired. The 6 Geo. 4, c. 50, s. 34, enacts, "that the person or party who shall apply for a special jury, shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury; unless the Judge before whom the cause is tried shall, immediately after the verdict, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." There are several authorities to shew that the word "immediately" means within a reasonable time; *Christie* v. *Richardson* (*a*). [*Pollock*, C. B.—In *Waggett* v. *Shaw* (*b*), Lord *Ellenborough* refused to certify on the following morning.] That case must be considered as overruled by *Page* v. *Pearce* (*c*), and *Thompson* v. *Gibson* (*d*). In this case a verdict having been taken for the plaintiff, the defendant could have no opportunity of applying for the costs of the special jury until after the making of the award. It is further objected, that the arbitrator did not certify until after his authority had expired; but though an arbitrator cannot make an alteration in his award, yet he may do any act for the purpose of

(*a*) 10 M. & W. 688; S. C. 2 Dowl. 503, N. S.
(*b*) 3 Campb. 316.
(*c*) 9 Dowl. 815; S. C. 8 M. & W. 677.
(*d*) 9 Dowl. 717; S. C. 8 M. & W. 281.

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carrying it into effect. [*Pollock*, C. B.—Not if the parties neglect to call his attention to it until after his authority has expired. *Parke*, B.—Surely it was intended that the arbitrator should make his award once for all: he ought to have included the costs of the special jury in the award.] At all events the defendant is entitled to the difference between the cost of the special jury in London and that in Middlesex. [*Pollock*, C. B.—The Master should consider what would have been the amount of costs if the cause had been tried in Middlesex, and then calculate the gross amount of costs actually incurred in Middlesex and London and deducting the one from the other, the balance would be the costs in the cause.]

E. V. Williams shewed cause in the first instance. The view taken by the Master was, that all costs occasioned by the arrangement should be costs in the cause; therefore, the defendant's right to the costs of the special juries would depend upon whether or not the arbitrator certified. The case resembles that of a remanet by consent, where the parties agree that costs incurred at the assizes shall abide the event. For the purpose of this arrangement it must be taken that the arbitrator has disallowed the costs of the special juries.

Webster. The case of a remanet by consent does not apply, for here there is a change of venue under special circumstances, and an amendment of the record and jury process.

PARKE, B.—The meaning of the agreement is, that all useless expenses incurred by the change of venue, whether relating to the change of venue or not, are to depend upon the verdict. The effect of Mr. *Williams*' argument is to divide the agreement into two parts, namely, that all costs except those of the special jury are to abide the event, and the costs of the special jury are to abide the certificate of

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the arbitrator. If the parties meant that, they should have so specified it. The agreement clearly means that all costs are to abide one event, which is to determine both. The result is, that the defendant is entitled to the additional costs of the special jury, which were occasioned by the change of venue from Middlesex to London; and as the Master was wrong in disallowing those costs, a rule must be granted.

PLATT, B.—Without some provision in respect of the fruitless costs, the Master would not have been justified in allowing them. It was, therefore, reasonable that the parties should ascertain upon whom they were to fall. They agree that the costs occasioned by the change of venue should be paid by the party who failed, and that the arbitrator should have the same power to certify as a Judge at nisi prius. It seems to me that the Master has taken a wrong view of the agreement, and that there must be a rule absolute.

Rule absolute.

DIXON *v.* OLIPHANT.

1 C. 15. M W 132.

A rule nisi for an attachment for non-payment of costs having been refused, on account of defective service: *Held*, that the application might be renewed after a fresh demand and due service.

IN the early part of the Term, the defendant moved the Court for a rule nisi for an attachment against the plaintiff for the non-payment of costs, pursuant to a rule of this Court, and the Master's allocatur thereon. The Court refused the rule on the ground of defective service; but leave was given to move again on effecting better service. A rule nisi was subsequently granted upon affidavit of due service and a fresh demand of the costs.

Pearson shewed cause, and objected that the same motion could not be renewed with amended materials. In *Levi* v.

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Coyle (*a*), where a defendant applied to the Court to set aside a warrant of attorney, judgment, and execution, on the ground of usury, but the rule was discharged upon an objection that the applicant did not produce a verified copy of the instrument; it was held incompetent for him to come to the Court a second time with a like motion upon the same materials, with the addition only of an affidavit verifying the warrant of attorney. So in *Ex parte Haskham* (*b*), where it was sought to enforce an undertaking, to which there was an attesting witness, and the rule was discharged for want of an affidavit by him, it was held that the application could not be renewed.

Oliphant, who appeared to support the rule, was not called upon.

POLLOCK, C. B.—There is no weight in the objection. The cases cited are those in which the same questions were brought before the Court on amended materials; but in the present case there has been a fresh demand, and a new contempt after proper service.

PARKE, B., ALDERSON, B., and ROLFE, B., concurred.

Cause was then shewn upon the merits, and the rule made

Absolute.

(*a*) 2 Dowl. 932, N. S. (*b*) 1 Dowl. 792, N. S.

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PIERPOINT *v.* BREWER.

THIS cause had been removed by certiorari from the Lord Mayor's Court.

Bail may justify in respect of share in a railway company in actual operation.

Henderson appeared to justify bail. The qualification was in respect of shares in certain Railway Companies in actual operation.

Morris opposed the bail, and objected that railway shares could not be considered in the light of property; at the best they were of a fluctuating nature, and might prove totally worthless.

ALDERSON, B.—They are surely property. Money itself is fluctuating in its nature, as shifting from one person to another.

PER CURIAM.

Bail allowed.

ABBOTT *v.* RICHARDS.

A SHERIFF having seized certain goods under a writ of fieri facias, the present plaintiff set up a claim to the goods. The sheriff applied for relief under the Interpleader Act, and it was ordered that the goods should be sold, and the money paid into Court, to abide the event of an issue between the claimant and the execution creditors. The issue was tried, and a verdict found for the claimant, who then brought the present action against the sheriff for breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods, and converting and disposing of the same to his

A sheriff having applied for relief under the Interpleader Act, a Judge directed the goods to be sold, and the money paid into Court, to abide the event of an issue between the claimant and execution creditor. A verdict being found for the claimant, he then brought an action against the sheriff for breaking and entering his dwelling-house, and seizing and converting his goods. The Court ordered that so much of the declaration as charged the defendant with seizing and converting the goods, should be struck out.

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own use. The writ issued on the 3rd of October, and on the 9th, an appearance was entered: the declaration was delivered on the 20th of November, and on the 28th, the defendant took out a summons for time to plead, and obtained ten days' time. Afterwards a summons was taken out, and an order made to stay all proceedings until the fifth day of Term; when a rule was obtained, calling on the plaintiff to shew cause why so much of the declaration as charged the defendant with "seizing and taking the goods of the plaintiff, and converting and disposing of the same to his own use," should not be struck out.

Humfrey and *Hance* shewed cause. First, the application is too late. [*Pollock*, C. B.—I am not aware that there is any such rule in cases of this sort, which is not one of irregularity. Where the sheriff has obtained an order under the Interpleader Act, the Court may give effect to it at any time. *Alderson*, B.—The question is, whether a party should be at liberty to charge the sheriff with an act done under the authority of the Court? The seizure of the goods is distinguishable from the breaking and entering the dwelling-house. The Interpleader Act intended to leave the question as to the seizure of the goods to be decided by the Judge.] All that the Judge does is to direct an issue as to the property in the goods. [*Pollock*, C. B.—If the plaintiff goes for an injury beyond the mere taking of the goods, that fact should have been represented to the Judge as a ground for his not interfering. *Alderson*, B. —For breaking and entering his house, the plaintiff is entitled to an action; but where the goods seized have been ordered by the Court to be sold, the owner ought not to be at liberty to bring an action; or what is the use of protecting the sheriff?] In that case, the plaintiff would sustain a serious injury, without having any remedy: the goods might sell for less than their value. A special damage might result from the mere act of seizure. [*Pollock*, C. B.—Upon a suggestion of special damage, the Judge

would decline to interfere. *Rolfe*, B.—If there be any question beyond the mere seizure of the goods, I think the statute gives the Judge no power: the words are "that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution." *Alderson*, B.—Possibly the Judge might have power to direct two issues, the one to determine the right to the goods, the other to determine the damages sustained by the seizure.]

Gray, who appeared to support the rule, was not called upon.

POLLOCK, C. B.—The rule must be absolute. Although it may be a hardship to have goods seized and sold, yet it seems to me that the question ought to be brought before the Judge when he makes the order. In the present case, I have looked into the affidavits for the purpose of seeing if there were any suggestion of special damage, but I find none; and the only matter before the Judge, was, as to the property in the goods, upon which he directed an issue. The sale of the goods appeared to be the proper mode of dealing with the matter, though it may be there is some doubt as to the authority of the Judge in thus proceeding without consent. In my opinion, the Judge may do whatever appears to him right, proper, and equitable under the circumstances. Since, therefore, the goods were sold under the authority and direction of the Judge, it would be very unjust towards the sheriff to make him responsible for that which is the act of the Court. The sheriff ought only to be responsible for the value of the goods sold. It is alleged that the plaintiff has sustained damage by the sale of the goods. If that be so, the fact should have been brought distinctly and substantively before the Judge at the time he made the order. We cannot protect the sheriff as to the trespass in breaking and entering the plaintiff's house; but with respect to the goods sold, it would be an opprobrium

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to the law to allow the plaintiff to go on and recover damages. The rule must be absolute on payment of costs.

ALDERSON, B.—In order to decide this question, we must see what the Interpleader Act says. It begins with the mode of relief for persons who ordinarily interplead; and they are to come into Court and make an affidavit that they do not claim any interest in the subject-matter of the suit, but are "ready to bring into Court, or to pay or dispose of the subject-matter of the action in such manner as the Court or any Judge thereof may order or direct." Then, upon bringing the subject-matter of the action into Court, to be disposed of as the Court or Judge shall direct, the Court or Judge are to make such order as shall be just and reasonable. Upon referring to the sixth section, we see what is to be done in the case of sheriffs; precisely the same thing—"to exercise for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained." The consequence is, that the Court or Judge has jurisdiction over the subject matter brought into Court, which consists of the goods seized, and they are to dispose of that in such a manner as under all the circumstances shall be just and reasonable. The Court or Judge is vested with a discretion over the matter which the sheriff brings before them, which is, that the sheriff has seized certain goods, which are still in his possession and disposition; and the Court or Judge are to make such an order as under all the circumstances shall be just and reasonable. That is the discretion which they are to exercise; and, if in the exercise of that discretion they direct the sheriff to sell the goods, it would be manifestly improper to allow the sheriff to be responsible, because he has sold the goods under the order and authority of the Court. If we were to permit a party to bring an action against a sheriff for obeying an order of the Court, we should be doing a grievous injustice to an officer of the Court. All that the Court now propose to do is to prohibit

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the plaintiff from recovering damages in respect of the sale of the goods; inasmuch as when the matter was before the Judge, he viewed all the circumstances of the case, and the injury, if there be any to the plaintiff, is, at all events, not one for which the sheriff should be responsible. It may be that the party has sustained some injury, and no doubt it is very hard to have goods wrongfully seized and sold, but that matter should have been submitted to the Judge.

ROLFE, B.—I am of the same opinion. I have some doubt whether the rule goes far enough. I question whether the Legislature meant that the parties should interplead, except in cases where the interpleader would dispose of every thing. The Judge exercises his discretion as to whether there shall be an interpleader or not: it is enough to suggest to the Judge that there may be a case of hardship, and if the Judge sees that there really is a question which would not be decided by saying "do the goods belong to A. or to B.," I doubt very much if the Judge has any jurisdiction. But to say that after the Judge has exercised his discretion, and made an order, the sheriff is to be open to another action, seems to me perfectly preposterous.

Rule absolute.

SYMES v. PROSSER.

5 C. 15. 9 M & W. 151.

BALL shewed cause against a rule for setting aside a judgment and writ of fieri facias for irregularity. He objected that the affidavits upon which the rule had been obtained were improperly intituled. In the writ of summons, the parties were described as Henry Symes and

Where a defendant was described in the writ as "Frederick C. Prosser," an affidavit in support of an application to set aside the judgment for irregularity, entitled "Henry Symes v. Frederick Coulston Prosser," is insufficient.

4 Dowl. 395.

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"Frederick C. Prosser;" whereas the affidavits in support of the application were entitled "Henry Symes and Frederick *Coulston* Prosser." Where an action had been brought against a defendant by the initial of his Christian name "W." and had proceeded to execution so entitled, it was held that an affidavit in support of an attachment against the sheriff for not returning the fieri facias could not be read, because it described the defendant by his Christian name of "William;" *Regina* v. *Sheriff of Surrey* (*a*). So where an affidavit was entitled "Geo. Shrimpton *v.* Wm. Carter the elder, sued as William Carter," the action being by "George Shrimpton *v.* William Carter," it was held that the affidavit could not be read; *Shrimpton* v. *Carter* (*b*).

Gray, in support of the rule, submitted that it sufficiently appeared that the defendant made the affidavit.

The COURT were of opinion that the affidavits were not entitled in the cause; but upon an intimation that they might perhaps allow them to be resworn, the objection was waived, and cause was shewn upon the merits.

(*a*) 8 Dowl. 511. (*b*) 3 Dowl. 648.

J.C. 15.Dn.VW.60

ATTORNEY GENERAL *v.* BOVET.

In an information by the Attorney General under the Customs' Act, the Court has no power to direct a commission for the examination of a witness abroad on behalf of the defendant; nor will the Court postpone the trial for the purpose of compelling the Crown to consent to such commission.

THIS was an information filed by *The Attorney General* on behalf of her Majesty's Customs, to recover penalties for causing to be entered for drawback certain wine alleged to have been of less value than the amount of such drawback.

The defendant pleaded not guilty, upon which issue was joined.

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Greenwood, in Michaelmas Term, moved on behalf of the defendant, for a rule to shew cause why a commission should not be issued out of and under the seal of this Court, for the examination upon interrogatories of Louis Clerc, of Fleurier, in the canton of Neufchatel, in Switzerland, a material and necessary witness on behalf of the defendant, and why such examination, when so taken, should not be read as evidence on the trial of this cause. The affidavit in support of the application, which was made by the clerk of the defendant's attorney, stated that "Louis Clerc, of Fleurier, in the canton of Neufchatel, in Switzerland, is a necessary and material witness for the defendant on this information, as this deponent is advised and verily believes, and that the defendant cannot safely proceed to trial of the said information without the evidence of the said Louis Clerc: that deponent is advised and verily believes that the defendant will be enabled to prove upon the trial of this information, by the evidence of the said Louis Clerc, if a writ of commission for the examination of the said Louis Clerc at Fleurier be permitted to issue, by whom the said quantity of wine to which this information relates was caused to be entered for drawback, and conclusively to establish that the same was not caused to be entered for drawback by the defendant as alleged in this information." It then alleged that Louis Clerc was not likely to be in this country until after the trial; that there was no intention to create delay; and that the defendant had a good defence upon the merits. Upon the suggestion of the Court, *The Attorney General* consented to a rule nisi, against which

The Attorney General, *The Solicitor General*, *Jervis*, and *J. Wilde*, shewed cause. The consent to the rule nisi was given in order that the matter might be discussed in Court, but the law officers of the Crown feel bound to resist the application. There would be great difficulty in convicting persons of fraud upon the Customs, if commissions were

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allowed to issue for the examination of witnesses. In the present case, the party proposed to be examined as a witness claimed the wine which was condemned, and it is intended to proceed against him (with others) for the penalties. The ends of justice require a vivâ voce examination and cross-examination of the witnesses. The affidavit is unsatisfactory: it is made by the attorney's clerk, who only states that he believes that Louis Clerc will be able to prove by whom the wine was entered for drawback. There is no affidavit of the defendant. The application is founded on the 1 Wm. 4, c. 22, the first section of which extends the provisions of the 13 Geo. 3, c. 63, so far as they relate to the examination of witnesses in India, to all the foreign possessions of the Crown, and "to all actions depending in any of his Majesty's Courts of law at Westminster, in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for." The case of *Laragoity* v. *The Attorney General* (*a*), is relied on in support of the rule, but in that case (which was a question arising out of the seizure of a vessel by the officers of the customs, charged with having been found armed for resistance whilst belonging wholly or in part to a British subject, and with other breaches of the navigation laws,) there had been a previous motion (*b*) for a commission to examine witnesses at Corunna. It was urged that the Court had power to issue the commission under the Navigation Act, 13 & 14 Car. 2, c. 11, the 29th section of which enacted, "that in case the seizure or information

(*a*) 2 Price, 172.

(*b*) *The Attorney General* v. *Laragoity*, 2 Price, 166.

shall be made upon any clause or thing contained in the late act, intituled 'An Act for the encouragement and increasing of Shipping and Navigation,' that then the defendant or defendants shall, on his or their request, have a commission out of the High Court of Chancery to examine witnesses beyond the seas," &c. But it appearing that the information charged offences against other acts, the Court said that "it would be departing from the common usage of the Court to grant the application. Such motions might in future be made in every case, on a suggestion that material witnesses resided abroad."—"The Crown has, in all cases, a right to a vivâ voce examination of a defendant's witnesses. There is, indeed, a case in *Bunbury* of a commission having been granted by this Court, but that was made on the Navigation Act." That rule was discharged, and the defendant then filed a bill on the equity side of the Court, and obtained a commission to examine the witnesses at Corunna. Whether or not the equity jurisdiction of this Court in matters of revenue be or be not abolished, it is not necessary now to discuss; but it will be found that all the cases in which commissions have issued to examine witnesses abroad are those in which bills have been filed. *Regina* v. *Wood* (*a*) is an express authority against this application. There it was held, that in an action at the suit of the Crown, the Court has no power to issue a mandamus for the examination of witnesses in India. The case of *Jenkins* qui tam v. *Larwood* (*b*), will probably be relied on by the other side. That was a motion under the 13 & 14 Car. 2, c. 11, s. 29, which enables a commission "to issue out of the High Court of Chancery," and it was agreed "that this being a remedial law, though it mentions only one instance, yet it shall extend to others within the same equity." "The Lord Chief Baron *Bury* and Baron *Price* were of opinion that such commission should go, not upon the act of Parliament, but by virtue of

(*a*) 7 M. & W. 571; S. C. 9 Dowl. 310.
(*b*) Bunb. 13.

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their original jurisdiction; Baron *Fortescue Aland*, that it might go even upon the statute, Baron *Mountague* dissenting in both." In that case the action was not at the suit of the Crown, but between subject and subject, the plaintiff suing qui tam by permission of *The Attorney General*. Now, all revenue proceedings are in the nature of a criminal information by *The Attorney General* as informant, and the Crown is a party on the record (*a*). Besides, that case was much pressed upon the Court in *The Attorney General* v. *Laragoity* (*b*), but was not admitted as an authority (*c*).

Greenwood, in support of the rule. This application does not rest solely upon the statute, but also on the original jurisdiction of the Court. The question was in fact disposed of in the case of *The Attorney General* v. *Reilly* (*d*). That was an information by *The Attorney General* for a breach of the revenue laws, and the Court granted a rule to examine a witness for the Crown before the Queen's remembrancer, but refused to order that the examination should be received in evidence at the trial. There is no ground for any distinction in this respect between the Crown and subject; and if the Court has power to order an examination before the remembrancer in this country, it may also order an examination abroad. In *Regina* v. *Wood* (*e*), the argument on behalf of the Crown was, that the suit was a civil and not a criminal proceeding, and that the only course was to file a bill in equity. In *The Attorney General* v. *Reilly* it was contended,

(*a*) 6 Geo. 4, c. 108, s. 100.

(*b*) 2 Price, 166.

(*c*) Mr. *Jervis* mentioned, that when *The Attorney General* v. *Wood* was argued, he had taken from the registrar's book two cases, one of which occurred in the year 1816, in which a commission was granted in equity on a bill filed for the purpose of having a commission; the other was *The King* v. *Arthur*, where witnesses were examined before the remembrancer, but the depositions were objected to, and subsequently rejected, on the ground that the Court had no power.

(*d*) *Ante*, vol. 2, p. 690; S. C. 13 M. & W. 676.

(*e*) 9 Dowl. 310; S. C. 7 M. & W. 571.

on the part of the Crown, that this Court has a peculiar equitable jurisdiction arising from the right of the Crown to collect its revenue, and that such jurisdiction might be exercised on motion without bill. In the present case it is again urged that the application must be by bill. In *The Attorney General* v. *Laragoity*, where the application was by motion, no authority was cited except the case of *Jenkins* qui tam v. *Larwood* (*a*); but on the subsequent application, where the proceeding was by bill, the Court desired that the precedents on the point which might be found among the records of this Court, and of the Court of Chancery, might be brought before them. They are to be found in 2 *Price*, 178, and amongst them is a case of *Butts* v. *Hart*, in which the commission was granted, upon the motion of counsel, for the defendant. There is no doubt that if the same authorities had been before the Court on the previous application, they would have granted the rule. In *Laragoity* v. *The Attorney General* (*b*), *Thompson*, C. B., in delivering the judgment of the Court, says, "the authority of this Court to grant commissions in such cases, is founded on its general jurisdiction at common law, and is not derived under any particular statute; and it acts on the necessity of its interference, to afford a defendant aid in trials at law." In *The Attorney General* v. *Reilly*, *Parke*, B., observes, "from the case of *Jenkins* v. *Larwood*, it would seem that the Court exercised the power under its revenue jurisdiction; for the application was made by motion; if it had been within the equitable jurisdiction, it would have been by bill filed." Besides, in this case the informer seeks to have half the penalty, and it is in substance an action between subject and subject. As this is not a proceeding in equity, it is not necessary to discuss the question whether or not the equity jurisdiction of this Court is abolished in matters of revenue. The various jurisdictions of the Court are fully stated in *Com. Dig.* tit. "*Courts*," (D 1), (D 2). It

(*a*) Bunb. 13.

(*b*) 2 Price, 172.

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is submitted that the Court has the same authority to direct a commission in cases between the Crown and a subject, as it has between subject and subject.

The Attorney General in reply. This Court, as a Court of common law, has no greater authority to issue a commission for the examination of witnesses than any other Court in Westminster Hall. If such a jurisdiction previously existed, there would have been no necessity for the provisions of the 1 Wm. 4, c. 22. The power, if it exist at all, must arise from the equitable jurisdiction of the Court; and assuming that such jurisdiction still remains in matters of revenue, it is enough to say, that the proper course has not been pursued, to enable the Court to exercise it. The cases referred to in *Laragoity* v. *The Attorney General* (*a*) are either motions under the Navigation Act, or proceedings by bill. [*Parke*, B.—There is the case of *Idle* v. *Westborne* (*b*), where the Court ordered:—"the trial put off, on payment of costs, and the plaintiff at liberty to examine his witnesses, giving the defendant a note before, of his witnesses."] That was on the 16th of June, 1724, and might have been in Term. [*Alderson*, B.—In those days this Court sat in equity three days in each Term. *Parke*, B.—There is another case of *Longman* qui tam v. *Kemble* (*c*), where it was ordered, "a commission ret. *sine delatione* and the trial put off till the sittings after next Term; and that the defendant have a writ of delivery, by consent, on giving the usual security." There the words "by consent" may apply either to the whole order, or to the writ of delivery only. *The Attorney General* v. *Reilly* (*d*) is no authority for this application. There *Pollock*, C. B., says, "we at present pronounce no opinion as to the effect of that examination as evidence at the trial. It appears to us that the question is not to be disposed of on motion. The

(*a*) 2 Price, 172.
(*b*) Id. 180, note.
(*c*) Id. 181, note.
(*d*) *Ante*, vol. 2, p. 690; S. C. 13 M. & W. 676.

officers of the Crown are to have the power of examining the witness, and the defendant will be at liberty to except to the reception of that evidence at the trial. The rule, therefore, will be absolute, so far only as relates to the examination." [*Parke*, B.—Previously to the act which gave the Court power to issue a commission for the examination of witnesses, it was the practice to stay the proceedings unless the plaintiff would consent, and that will explain the cases which have occurred on motion.] Wherever the order is set out at length, it will appear to have been made upon a bill filed. [*Parke*, B.—*The Attorney General* v. *Reilly* was decided in favour of the Crown, merely because if decided against the Crown there was no appeal; whereas if decided in favour of the Crown, the decision might be supported, on the ground that the examination of witnesses upon interrogatories before an officer of the Court was part of the ancient jurisdiction of the Court: it would be for a Court of error to say whether or not the ancient jurisdiction was taken away by act of Parliament. That would not apply to the case of a defendant.]

[*Moseley*, amicus curiæ, referred to a passage in Bracton, fol. 107, as shewing that the Court had no power to issue a commission unless it had power to compel the parties to attend: "Oportet etiam quod ille qui judicat, ad hoc quod rata sint judicia, habeat jurisdictionem ordinariam vel delegatam, et non sufficit quod jurisdictione mhabeat, nisi habeat coertionem; quod si judicium suum executioni demandare non posset, sic essent judicia delusoria:"—"Sunt enim causæ spirituales in quibus judex secularis non habet cognitionem nec executionem quum non habeat coertionem."]

POLLOCK, C. B.—This is an application for a commission to examine witnesses in a case where the *Attorney General*, on the part of the Crown, files an information against the

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defendant for penalties. No direct authority has been cited by the defendant, though if the Court had the power to grant such an application, there would scarcely have been an instance in which an application would not have been made to the Court to exercise its discretion. It may be a very proper jurisdiction for the Court to possess, but it must be conferred upon the Court by the Legislature. There is no case which authorizes the Court so to act. All the cases where the Court appears so to have interfered have been either where bills have been filed on the equity side of the Court, or where there has been a consent, or where there has been an application by the opposite party. In the present case, where the *Attorney General* is suing on the part of the Crown, I do not think that the defendant has a right to stop the Crown from going on with it, until the Crown shall have consented to something which this Court have not the power to order. In the case of *Calliand* v. *Vaughan* (*a*), the Court of Common Pleas would not interfere to put off a trial, or use any indirect means to compel a party to consent to a commission for the examination of witnesses in Scotland. The Court seemed to think that the plaintiff had a right to stand upon the rights which belonged to him as a suitor in the Court; and Chief Justice *Eyre* is there reported to have said, "the plaintiff however thinks fit to stand upon his rights: he refuses to consent, and we are called upon for a decision. The question then is, whether the Court should, under the circumstances of this case, give the defendant till next Term to enable him to apply to a Court of equity," &c. And the Court, even in a case between subject and subject, refused to interfere to put off the trial, in order to compel the party to consent. In other words, the Court said this, "we will not use a power which we have, for the purpose of indirectly exercising a power which we have not." That, as it appears to me, was a most proper and correct decision. A fortiori,

(*a*) 1 B. & P. 210.

in a case where the Crown is concerned, in a matter of revenue, it would be extremely improper to use any of the authority which undoubtedly belongs to the Court, for the purpose of indirectly coercing and compelling the *Attorney General* to take a course which we have not the power to order him to take directly. With respect to the common law jurisdiction of the Court to exercise this power, I have no doubt that such jurisdiction does not exist. I believe it will be found to be true almost without exception, that the common law of England takes no notice of any other country, any other law, or any other usage. It recognises, indeed, the residence of foreigners among us, but it takes no notice of the law or the usages, apparently, of any other country; and nearly the whole of the common law seems to have been framed and established as if there had been no other country in the world except England itself. I apprehend, therefore, that we have no common law jurisdiction to send a commission into a foreign country there to examine witnesses, and no power there to administer an oath, the common law not recognising the authority of any body out of this country to administer one. Upon that point I really feel, upon principle, no doubt whatever. But the refusal of the rule may, with perfect safety, be put upon this ground; that there is no authority whatever to be found in the books for the exercise of this power on the part of the Court; and it is of that description, that if it had belonged to the Court, the instances in which the application would have been made, and the practice established, must have been so numerous, and the circumstances under which such a commission would issue must have been so settled, that there would long ago have been in this Court a branch of the law, with a multiplicity of decisions, with reference to the issuing of such commissions. Upon these grounds, both upon principle and upon authority, I am quite satisfied that we do not possess such jurisdiction unless it be on the equity side. Whether that jurisdiction is gone or not, is at this moment the subject of consideration in the Court; but

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with reference to the present application, that question does not arise. I am of opinion, therefore, that the rule should be discharged.

PARKE, B.—I am of the same opinion. With respect to the right by the statute, it is perfectly clear since the case of *The Attorney General* v. *Wood* (*a*), that the defendant has no right, and the motion certainly cannot be sustained upon the ground that the statute gives him any. The question is, whether he has any by the common law jurisdiction of this Court. Whether he has any by the equitable jurisdiction is a matter upon which I pronounce no opinion; because, whether a bill would lie for the purpose of examining a witness for the defendant, is a point which is not yet settled: but I am to ask myself the question whether at common law the Court has such a jurisdiction. There is no doubt that Lord *Mansfield* in his time went considerable lengths in order to give the defendant the same relief in a Court of law which he would have had upon a bill filed. He went so far as a case mentioned by himself in *Mostyn* v. *Fabrigas* (*b*). There, upon "a criminal prosecution of a woman who had received a pension as an officer's widow, it was charged in the indictment that she never was married to him. She alleged a marriage in Scotland, but that she could not compel her witnesses to come up to give evidence. The Court obliged the prosecutor to consent that the witnesses might be examined before any of the Judges of the Court of Session, or any of the Barons of the Court of Exchequer in Scotland, and that the depositions so taken should be read at the trial. And they declared that they would have put off the trial of the indictment from time to time for ever, unless the prosecutor had so consented." That certainly was going a great length, to an extent unquestionably which has not been followed in more recent times. I quite concur in the observations which my Lord has made upon

(*a*) 7 M. & W. 571; S. C. 9 Dowl. 310. (*b*) 1 Cowp. 174.

the case in the Common Pleas, where the Court refused to do indirectly what they had no power to do directly, namely, to put off the trial of the case, in order to compel the plaintiff to examine witnesses under a commission. Now that being so, let us see whether there are any precedents of such a proceeding as this in this Court. The case of *Laragoity* v. *The Attorney General* (*a*), is a case directly in point; because this Court, upon motion addressed to their common law jurisdiction, refused to interfere; and they put the defendant to file his bill for a commission, and then the Court thought it was a case in which they ought to interfere. It has been observed, with respect to that case, that several authorities were cited upon the argument on the equity side of the Court, and that if they had been brought before the Court at the time of the motion on the common law side, they would probably have granted the application. Now I have looked at these precedents, and there appear to be only two which give a colour of supporting such an application. Taking the majority of them, they are cases in which a bill had been filed; but there are two in which it does not appear upon the order that a bill had been filed. Whether those two proceeded upon the ground that the plaintiff or the Crown on behalf of the plaintiff, consented, does not distinctly appear. It may have been a matter perfectly agreeable to the Crown that such a commission should issue, and there certainly is not a single case of any interference on the part of this Court to stay the proceedings on the part of the prosecutor, where the Crown or the prosecutor was unwilling to consent. If that be so, there is no authority in support of this application, and I think the application ought to be dismissed, without considering whether this is a fit case for the Court to interfere, if a bill in equity had been filed.

ALDERSON, B.—I am of the same opinion. I do not

(*a*) 2 Price, 172.

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think we have any jurisdiction under the common law to grant this application. There is no authority cited to induce me to come to that conclusion. All those cases which are mentioned in *Laragoity* v. *The Attorney General* (a), one may very well understand; my belief is, that they were all on the equity side. They were all cited in an equity case, and every one of them may have been, though from the short way in which they are reported one is not quite certain that they were, on the equity side. With respect to the greatest part of them, they are upon bills filed, and, with respect to two, if they were upon the common law side, they are simply applications on the part of the defendant to put off the trial, and then the Court, upon his making that application, refused his application, as well they might, unless he would consent to a commission issuing for the purpose of the examination of witnesses by the other side. But there is a common law jurisdiction—there is the "coertionem" which the learned counsel refers to, as well as the power of directing the thing to be done. I apprehend the coercion spoken of by *Bracton* is simply a coercion where the party is before the Court. If the one party who applies, and the other party who is against the rule, shewing cause, are both subject to the coercion of the Court, the Court have that coercion which gives them jurisdiction. It does not at all apply to witnesses who are the subject of commission, because nobody can doubt, if two English subjects suing in this Court have a commission issued for the examination of witnesses in China, that will not give the Court coercion over the Chinese parties, but it gives them a coercion over the two parties who are the contesting parties before them. That is all that *Bracton* means. I apprehend, therefore, that that explains the difficulty which is suggested to the Court by the passage out of *Bracton*. And with respect to the cases, it appears to me, I confess, that they afford such reasons as satisfy me that we have no such jurisdiction as that which is claimed.

(a) 2 Price, 172.

PLATT, B.—I agree entirely in all the observations of my learned Brother, and would only add one or two words. Looking at the case of *The Attorney General* v. *Wood* (*a*), it is very remarkable that the learned counsel bases the whole of the argument upon two statutes, namely, the 13 Geo. 3, c. 63, and 1 Wm. 4, c. 22, never supposing that there is an original jurisdiction in this Court as is suggested, to which he might have addressed himself, and might have saved himself the trouble of referring to those statutes. That likewise is the ground upon which the Court proceeded, and we can hardly suppose, if there had been any such jurisdiction exercised, that the opposite party should not have been able to cite something to the Court for the purpose of guiding them to that conclusion. But there is an absence of any such precedent. With respect to the passage cited from *Bracton*, which the learned counsel has been kind enough to supply to the Court, it appears to me that the power of coercion cannot be taken so extensively as it is sought to be applied, because let us see whether it is true that the Court has a power of coercion coextensive with its jurisdiction. The Court had power to direct the examination of witnesses abroad under the statute 1 Wm. 4. Has it the power of compelling the witnesses to attend? Certainly not. Until the late act, although the Court had power to refer cases, they had no power of compelling witnesses to appear before the arbitrator—none at all; and, therefore, it does seem that that passage must be taken with some considerable limitation for the purpose of being applied to any case that may be brought before the Court. It seems to me, I own, that the Court has no such jurisdiction as that which is contended for, and that that being the case, this application cannot be maintained.

Rule discharged.

(*a*) 7 M. & W. 571; S. C. 9 Dowl. 310.

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S. C. 14 M. & W. 831.

STEELE *v.* BENHAM, LAYTON, and HARMER.

To an action by indorsee against acceptor of a bill of exchange drawn by W. The defendants pleaded, fourthly, that after they accepted the bill, and before it was indorsed to the plaintiff, W. waived the acceptance. Fifthly, a similar plea, alleging that the bill was indorsed to the plaintiff after it was due. Seventhly, that the bill was drawn upon the defendants as the directors of a certain company established by act of Parliament, and that they accepted it as such directors for a debt contracted by the company. Eighthly, a similar plea, denying consideration. Ninthly, a similar plea, alleging that the bill was indorsed after it was due. Tenthly, that after the bill was accepted and delivered to W., he indorsed it to H. (one of the defendants) for consideration, and that H. delivered the bill to the plaintiff, who had notice. Eleventhly, a similar plea, denying consideration. Twelfthly, a similar plea, alleging that the bill was indorsed by H. to the plaintiff after it became due. *Held*, on special demurrer, that the fourth and fifth pleas were bad, for not alleging that W. was the holder of the bill at the time he waived the acceptance.

Secondly, that the seventh, eighth, and ninth pleas were also bad, as the act of Parliament gave the directors of the company no power to accept bills.

Thirdly, that the tenth, eleventh, and twelfth pleas were bad as an argumentative denial of the indorsement of the bill to the plaintiff.

ASSUMPSIT on a bill of exchange drawn by one William Wood upon and accepted by the defendants, and indorsed by W. Wood to the plaintiff.

The defendants, Benham and Layton, pleaded fourthly, that after the defendants accepted the bill, and before it was indorsed to the plaintiff, to wit, on, &c., W. Wood waived the acceptance of the bill, and exonerated and discharged the defendants from the same, and from the payment of the bill: that no person ever gave or received any consideration for the indorsement.

Fifth. A similar plea, alleging that the bill was indorsed to the plaintiff after it became due.

Seventh. That at the respective times when the bill was made and directed to and accepted by the defendants, the defendants were the directors of the Gravesend and Milton Cemetery Company, being the company mentioned in the act of Parliament 1 Vict. intituled, &c. (1 & 2 Vict., c. xxxv., local and personal, public); that when the bill was directed to the defendants, it was directed to them as and by the style of the directors of the said company, and that at the time when the bill was accepted by the defendants, it was accepted by them by the style of the directors of the said company, and that at the time when the said bill was accepted by the defendants, it was accepted by them as such directors of the said company, and in the capacity of directors of the said company, pursuant to the said act on behalf of the said company, and for and on account of a debt then due and payable from the said company to the said W. Wood, which debt, after the passing of

the said act, and before the making and accepting of the bill, to wit, on, &c., had been contracted by the said company with W. Wood, under and by virtue of the powers of the said act; of all which premises W. Wood and the plaintiff had notice.

Eighth. A similar plea, alleging that there was no consideration for the indorsement.

Ninth. A similar plea, alleging that the bill was indorsed to the plaintiff after it became due.

Tenth. That after the making and accepting of the bill, and before it became due, to wit, on, &c., the same was delivered so accepted by the defendants to W. Wood: that after the bill was so accepted and delivered, and while W. Wood was the holder and payee thereof, and before the bill became due, W. Wood indorsed the bill to the defendant Harmer, and then delivered the bill so indorsed to Harmer with the intention of divesting himself, and whereby W. Wood did divest himself, of all right, title, and interest of, in, and to the bill, and of the right of suing thereon when the same should become due, and of indorsing the same again: that when the bill was indorsed to Harmer, it was indorsed for a good and valuable consideration then therefore paid by Harmer to W. Wood, to wit, the sum of 380*l.*: that Harmer continued to be and was the holder and possessor of, and the person entitled to the bill always from the time of the indorsement thereof by W. Wood, until the bill was afterwards, to wit, on, &c., delivered by Harmer to the plaintiff: that the indorsement in the declaration mentioned consists merely of the said last mentioned delivery by Harmer to the plaintiff of the bill so indorsed by W. Wood, and that the bill was never indorsed by W. Wood otherwise than as in this plea mentioned: that at the time the bill was delivered to the plaintiff, he had notice and knowledge of all the facts and things in this plea mentioned. Verification.

Eleventh. A similar plea, alleging that there was no consideration for the delivery of the bill to the plaintiff so indorsed as aforesaid.

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Twelfth. A similar plea, alleging that the bill was indorsed by Harmer to the plaintiff after it became due.

Special demurrer to the fourth plea, assigning for cause that it is not alleged that W. Wood, at the time he waived the acceptance of the bill, and exonerated and discharged the defendants from the same, and from the payment of the bill as in the plea alleged, was the holder of the bill, or was otherwise so situated as to make such waiver exoneration and discharge of any force or effect, it being consistent with the plea that W. Wood had parted with the possession of and all control over the bill, by indorsing the same to some person other than the plaintiff: also that it is not specifically stated how or in what way W. Wood waived the acceptance of the bill, and exonerated and discharged the defendant from the same, and from the payment thereof: also, that if it is meant by the plea that such waiver, &c., was caused or effected by some contract or agreement entered into between W. Wood and the defendant, then as the bill is an inland bill, the acceptance whereof was necessarily in writing, then such contract or agreement, in order to have caused such waiver, must have been a contract in writing, and should have been so alleged in the plea.

There was a similar demurrer to the fifth plea.

Special demurrer to the seventh plea, assigning for causes that the defendants had not, either as directors of the said company, or in the capacity of directors thereof, any right, title, or authority by, under, or in pursuance of the said statute, to accept the bill for the purposes mentioned in the seventh plea: that the plea professes to be in confession and avoidance, but in fact amounts to and is in denial of the acceptance in the first count mentioned, and should have consequently concluded to the country, and not with a verification: that it tends to unnecessary prolixity of pleading, as the facts therein stated could have been given in evidence under a plea traversing the acceptance of the bill, modo et formâ.

There was a similar demurrer to the eighth and ninth pleas.

Special demurrer to the tenth plea, assigning for causes that the allegation that W. Wood indorsed the bill to the defendant Harmer, and then delivered the bill so indorsed to Harmer, with the intention of divesting himself, the said W. Wood, and whereby he did divest himself of all right, title, and interest of in and to the said bill, and of the right of suing thereon when the same should become due, and of indorsing the same again, is mere surplusage, immaterial and insensible, and tends to prolixity of pleading, and that such allegation is a mere inference of law, viz., that which arises from the fact of an indorsement in blank: that the plea furnishes no answer to the first count, inasmuch as it is not alleged therein that the bill was accepted by the defendants without consideration, or that the said W. Wood was the drawer, payee, and holder thereof without consideration, and even assuming that Harmer could not have sued the acceptors of the bill, yet the mere fact of the bill having come to and passed through the hands of Harmer for good consideration, is wholly immaterial, and is in no way a discharge of the liability of the defendants to be sued thereon by the plaintiff as indorsees of W. Wood: that the plea professes to be a plea in confession and avoidance, but in fact amounts to a denial of the indorsement of the bill, and should have concluded to the country.

There were similar demurrers to the eleventh and twelfth pleas.

Martin, (December 2), in support of the demurrers. The fourth and fifth pleas are clearly bad: they contain no averment that Wood was the holder of the bill at the time he waived the acceptance.

PARKE, B.—Consistently with every allegation in these pleas, Wood may have indorsed away the bill; and it may have been transferred through twenty hands before it came

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to the plaintiff, and in the meantime Wood might have waived the acceptance. In order to make these pleas good, should appear that Wood was the holder of the bill at the time he waived the acceptance.]

Martin then argued that the seventh, eighth, and ninth pleas were bad in substance, on the ground that the 1 & 2 Vict. c. xxxv., did not empower the directors of the Gravesend Cemetery Company to accept bills for the payment of debts incurred by the company. He referred to the 46th, 47th, and 34th sections of the above act, and cited *Dickinson* v. *Valpy* (*a*). He also argued that the acceptance of bills by such a company would be a violation of the privileges of the Bank of England as secured by various acts of Parliament; *Broughton* v. *Manchester Waterworks Company* (*b*.) He referred also to *Stark* v. *Highgate Archway Company* (*c*). The tenth and following pleas are also bad both in substance and for the ground specially assigned for demurrer. While Harmer held the bill, it is clear no action could be maintained against the acceptors, because the plaintiff and defendants would be the same person, but it does not follow that the negotiability of the instrument was annihilated so that a subsequent indorsee might not sue; *Richards* v. *Richards* (*d*). [*Parke*, B., referred to *Morley* v. *Culverwell* (*e*).] At all events, the pleas are bad as an argumentative denial of the indorsement. *Marston* v. *Allen* (*f*) decided that a plea denying the indorsement of a bill of exchange puts in issue not only the fact of the signature, but also a delivery with intent to transfer the bill.

Jervis, contrà. First, as to the fourth and fifth pleas. If the declaration and plea be read together, it sufficiently

(*a*) 10 B. & C. 128; S. C. 5 M. & R. 126.
(*b*) 3 B. & A. 1.
(*c*) 5 Taunt. 792.
(*d*) 2 B. & Ad. 447.
(*e*) 7 M. & W. 174.
(*f*) 1 Dowl. N. S. 442; S. C. 8 M. & W. 494.

appears that Wood was the holder of the bill at the time he waived the acceptance. The declaration states that Wood drew the bill payable to his order; that the defendants accepted it, and that Wood indorsed it to the plaintiff. The plea alleges, that after the acceptance and before it was so indorsed to the plaintiff, Wood waived the acceptance. It therefore appears that the waiver took place before any person had acquired a title to the bill.

[PARKE, B.—The allegation in the declaration would be proved by an indorsement by Wood in blank. The bill might have passed through numerous hands before it came to the plaintiff. The plea does not say that the waiver took place before Wood put his name on the bill, but before the indorsement to the plaintiff, that is, before the plaintiff had a title by indorsement.]

Jervis then argued that the seventh, eighth, and ninth pleas were good, inasmuch as the company had power to accept bills. He referred to the 6th, 8th, 46th and 47th sections of the 1 & 2 Vict. c. xxxv.

PARKE, B.—If we look to the provisions of the act, it is quite foreign to the purposes of such a company to accept bills.

Jervis then submitted that the tenth and following pleas were good in substance. He cited *Freakley* v. *Fox* (*a*), *Wankford* v. *Wankford* (*b*), and *Cheetham* v. *Ward* (*c*).

Cur. adv. vult.

PARKE, B.—This was an action on a bill of exchange accepted by Harmer and the other defendants. There were several pleas, and the Court have already given their

(*a*) 9 B. & C. 130.; S. C. 4 M. & R. 18.

(*b*) Salk. 299.

(*c*) 1 B. & P. 630.

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opinion that the fourth, fifth, seventh, eighth, and ninth pleas were bad, for the reasons which were assigned at the time of the argument. The Court reserved its opinion upon the tenth, eleventh, and twelfth. The tenth and eleventh pleas in substance state that Wood, who was the payee of the bill accepted by Harmer and the other defendant, indorsed over the note to Harmer; that Harmer paid a valuable consideration for it, and that afterwards it was indorsed over to the plaintiff, without notice in the one plea, and without value in the other. Upon those pleas the Court have intimated a strong opinion that in point of law they are no answer to the action; and as the substance of these pleas is no answer, it is not necessary to give a final and conclusive opinion upon the points raised by the special demurrer. There is some doubt about the effect of the twelfth plea, which was, that the bill, when due, was in the hands of Harmer as indorsee of Wood, Harmer himself being one of the persons liable to pay the acceptance, and therefore, it was argued, that it could not be afterwards transferred. Upon that point the Court feel very considerable doubt: it is unnecessary to give any opinion upon it, because there is one objection pointed out by special demurrer which is common to all the three last pleas, that is, that they do not confess and avoid, but are an argumentative traverse of the indorsement. Now all these three pleas state, that after the making and accepting of the bill, and before it became due, the same was delivered so accepted by the defendants to W. Wood, who was the payee; that after the bill was so accepted and delivered as aforesaid, and while W. Wood was the holder and payee, and before the bill became due, W. Wood indorsed the bill to J. Harmer. It does not say that he indorsed the bill in blank, so that the bill could be afterwards transferred to any body, but that he indorsed it to Harmer; and then the plea goes on to state that he did so with the intention to divest himself of all title in the bill, and that Harmer afterwards delivered the bill to the plaintiff. There is no admission

of any title in the plaintiff unless the bill were previously indorsed in blank, and the plea does not state the bill was indorsed in blank, and, therefore, it is only an admission that the plaintiff was owner of the bill by delivery, and not by indorsement; and, consequently, the plea, strictly construed (as it must be against the defendants) is not a confession and avoidance, but amounts to an argumentative denial of the indorsement. That objection is pointed out by special demurrer, and must prevail, and we hold that all these pleas are bad. They ought to have concluded with a traverse of the indorsement, or there ought to have been a confession and avoidance, by stating that the bill was indorsed to Harmer in blank, so that he, by simple delivery, could transfer it to the plaintiff, and so that the plaintiff might then allege the bill to have been indorsed by Wood to him. That is a fatal objection to the three last pleas. It therefore becomes unnecessary to give any opinion whether the twelfth plea is in substance good or not.

Judgment for Plaintiff.

CLARK, Administratrix, &c. *v.* DANN.

Where, after writ issued, the defendant applies to a Judge to stay proceedings on payment of a certain sum and costs, and the plaintiff refuses to accept the sum offered, alleging that more is due, but at the trial recovers no more; he is entitled to full costs, unless the amount offered has been paid into Court.

THIS was an action by an administratrix for work and labour done by the intestate. After service of the writ, and before declaration, the defendant took out a summons to stay proceedings on payment of 40*l.* and costs. The plaintiff refused to accept the amount offered, alleging that more was due; and the Judge before whom the summons was heard made an indorsement accordingly. The declaration having been delivered, the defendant applied for leave to plead a plea denying that the plaintiff was administratrix, and also a plea of payment of 40*l.* into Court. It having been suggested that payment of money

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into Court would admit the representative character of the plaintiff, the defendant abandoned the latter plea. The cause came on for trial, when a verdict was taken for the plaintiff, subject to the award of an arbitrator; the costs of the cause to abide the event. The arbitrator awarded that the verdict should stand for the plaintiff, with 22*l.* 10*s.* damages. The Master, on taxation, allowed the plaintiff the ordinary costs of the cause; and the defendant took out a summons to review the Master's taxation, by disallowing the plaintiff her costs from the time of the summons to stay proceedings, on payment of the 40*l.* The summons was made returnable before *Platt*, B., who made an order accordingly.

Gray had obtained a rule nisi to rescind the order of *Platt*, B., against which

Hugh Hill shewed cause. The order is correct. In the case of *Parsons* v. *Pitcher* (*a*), the defendant, on being sued, offered the plaintiff a sum of money, which the latter refused. On the 27th of October, the defendant obtained an order to pay that sum into Court, and, on the 4th of November, the money not having been paid in, the plaintiff, who was then willing to receive it, gave notice, that unless it were paid he should resort to further proceedings. The notice having produced no effect, the plaintiff filed his declaration on the 9th, and, on the 13th of December, the defendant paid the money into Court, when the plaintiff took it out, and stayed proceedings. It was held that the plaintiff was entitled to costs only up to the 27th of October.

Gray, in support of the rule, was not called upon.

POLLOCK, C. B.—As the defendant did not pay the money into Court, the plaintiff could not do otherwise than go on with the action.

(*a*) 4 Bing. N. C. 306; S. C. 5 Scott, 791; 6 Dowl. 432.

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ALDERSON, B.—The rule is universal, that where the parties go before a Judge, and the defendant offers money, which is refused, it is only upon payment of the money into Court at a subsequent period that the plaintiff is deprived of costs, if he recover no more than the sum paid in.

Rule absolute (*a*).

(*a*) See *Gover* v. *Elkins*, 3 M. & W. 216; S. C. 6 Dowl. 335.

RICHARDS *v.* EASTO.

TRESPASS for placing divers large quantities of bricks, stones, and building materials upon the wall and close of the plaintiff

Plea, not guilty, (by statute).

The cause came on for trial at the Kingston Spring Assizes, 1845. It was referred to arbitration, with liberty for the arbitrator to state any point of law for the decision of the Court. The arbitrator found, that the writ of summons issued on the 14th of June, 1844, prior to the passing of the Building Act, 7 & 8 Vict. c. 84, and that the venue was laid in Surrey. That the houses of the plaintiff and defendant adjoined each other, being separated by a wall, which had existed for several years; and that the trespass consisted in the defendant having made an addition to each end of the wall by building upon it, the defendant, at the time of making such addition, bonâ fide believing the wall to be a party wall, and intending to comply with the provisions of

The Building Act, 14 Geo. 3, c. 78, s. 100, enacts, that every action for anything done in pursuance of that act, where the cause of action arises out of the city of London, shall be laid and tried in Middlesex: that the defendants may plead the general issue, and give the special matter in evidence; and if the action be laid in any other county or place than aforesaid, the jury shall find for the defendants. The 5 & 6 Vict. c. 97, s. 3, repeals so much of any act "of a local or personal nature" as permits parties to plead the general issue, and give the special matter in evidence. In trespass for placing bricks, &c., on a wall of the plaintiff, to which the defendant pleaded not guilty by statute; *Held*, that the 14 Geo. 3, c. 78, was an act "of a local and personal nature," except as to the 84th and 86th sections: and that the defendant could not, under the general issue, avail himself of the defence that he bonâ fide believed he was acting under the provisions of that act; nor could he, under that plea, object that the venue was laid in the wrong county; but should have pleaded those matters specially.

Held also, that the New Building Act, (the 7 & 8 Vict. c. 84,) which is printed amongst the public general statutes, is an act of "a local and personal nature."

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the Building Act. That the wall was not within the city of London, or the liberties thereof, but was situate within the county of Surrey, and within the district over which the provisions of the 14 Geo. 3, c. 78, extended; that the wall upon which the building took place was not a party fence wall, or a party wall, nor a wall in common between the plaintiff and the defendant, but was entirely standing on the land of the plaintiff, and was his wall exclusively. That before the commencement of the action, the plaintiff gave a notice of action sufficient to satisfy the 100th section of the Building Act, and commenced his action within three calendar months after the trespass. The questions raised for the opinion of the Court were, first, whether the statute 5 & 6 Vict. c. 97, s. 3, or the 7 & 8 Vict. c. 84, took away from the defendant the power of pleading not guilty by statute, under the 14 Geo. 3, c. 78. Secondly, supposing the Court to be of opinion that the above statutes did not take away the power of pleading not guilty, whether the defendant was entitled to the protection of the 14 Geo. 3, c. 78, by pleading not guilty, and giving the special matter in evidence, although the wall built upon by the defendant was not a party wall, or party fence wall; and under such plea to object, that the venue was improperly laid in Surrey instead of Middlesex. If the Court should think that the above statutes, or either of them, had not taken away from the defendant the power of pleading not guilty, and giving the special matter in evidence, although the wall was not a party wall, or a party fence wall; then the verdict for the plaintiff was to be set aside, and a verdict entered for the defendant. But if the Court should think that the above statutes, or either of them, did take away from the defendant the power of pleading not guilty by statute, or that he was not entitled to the benefit of pleading the general issue, and giving the special matter in evidence, in consequence of the wall not being a party wall or party fence wall; the next question was, whether, upon the common plea of not guilty, although the wall was not a party wall, or a party fence wall,

the defendant was entitled to avail himself of the objection, under the 14 Geo. 3, c. 78, s. 100, that the venue was laid in Surrey, and not in Middlesex. If the Court should think, that upon the common plea of not guilty the defendant was not able to avail himself of the objection, that the venue was laid in Surrey, and not in Middlesex, the verdict for the plaintiff was to stand, and the damages to be reduced to 40*s.*

Unthank for the plaintiff. The 5 & 6 Vict. c. 97, s. 3, (*a*) has in effect repealed the 100th section of the 14 Geo. 3, c. 78, which enables a party sued for anything done in pursuance of that act, to plead the general issue, and give the special matter in evidence (*b*). The distinction between

(*a*) Enacts, "that so much of any clause or provision in any act or acts commonly called public, local and personal, or local and personal, or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed."

(*b*) 14 Geo. 3, c. 78, s. 100 :— "That no action or suit shall be commenced against any person or persons for any thing done in pursuance of this act, until twenty-one days after notice in writing, of an intention to bring such action or suit, has been given to the person or persons against whom such action or suit shall be brought, nor after the expiration of three calendar months next after the fact committed; and every such action or suit, the cause whereof shall arise within the said city of London or the liberties thereof, shall be laid and tried in the said city of London, and not elsewhere; and every such action or suit, the cause whereof shall arise in any part of the limits aforesaid out of the said city of London and liberties thereof, shall be laid and tried in the county of Middlesex, and not elsewhere; and the defendant or defendants in every such action or suit may plead the general issue, and give this act, and the special matter in evidence, at any trial or trials to be had thereupon, and that the matter or thing, for which such action or suit is brought, was done in pursuance and by the authority of this act: And if the said matter or thing appear to have been so done, or if it appear that such action or suit was brought before the expiration of twenty-one days after such notice given as aforesaid, or that sufficient satisfaction was made or tendered before such action was brought; or if any such action or suit be

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a general and a special statute is pointed out in *Holland's case*, (*a*) where it is said, "that of general statutes the Judges ought to take notice, although they be not pleaded; otherwise of special or particular statutes. And for the better understanding of our books in this point, and which shall be said in judgment of law, statutum generale, and which, statutum speciale, it is to know that generale dicitur a genere and speciale a specie." Although the act in question embraces an extensive district, it is equally local with the Central Criminal Court Act, (4 & 5 Wm. 4, c. 36,) or the Metropolitan Police Act, (2 & 3 Vict. c. 47.) Even where a Court of Requests' Act contained a clause declaring that it should be deemed a public act, it was nevertheless, held to be a public, local, and personal act, within the 5 & 6 Vict. c. 97; *Cock* v. *Gent.* (*b*) (He was then stopped by the Court).

Secondly, As to the objection that the venue is laid in the wrong county, there is no issue to raise the question of locality. The defendant ought to have pleaded specially that the alleged trespass was committed under the authority of the Building Act. *Boyes* v. *Hewetson* (*c*) shews, that the objection is no ground of nonsuit. It may be as well said, that want of notice of action, or tender of amends, might be given in evidence under the plea of not guilty.

Martin, for defendant. First, The right of pleading the general issue under the 14 Geo. 3, c. 78, s. 100, has not been taken away by the 5 & 6 Vict. c. 97, s. 3. The former act is not a "local and personal" act, it will be found printed among the public general statutes. Neither does it fall within the definition of an act "of a local and personal nature," such as a canal act, or a road act. Nor is it an act "commonly called public, local and personal."

not commenced within the time herein for that purpose limited, or be laid in any other county or place than as aforesaid; then the jury, in every such action or suit, shall find for the defendant or defendants therein."

(*a*) 4 Rep. 76.

(*b*) *Ante*, vol. 1, p. 413; S. C. 12 M. & W. 234.

(*c*) 2 Bing. N. C. 575.

Secondly, it was not necessary to plead that the venue was laid in the wrong county, for that is a matter collateral to the pleading, and one on which the Judge must act at the trial. Such a plea would be open to demurrer, for it would neither traverse, nor confess and avoid the alleged trespass. *Boyes* v. *Hewetson* only decides, that in covenant by assignee of lessee against lessor, the locality not appearing on the face of the declaration, the plaintiff could not be nonsuited on the ground of a wrong venue. But in this case the statute expressly requires, that the venue shall be laid in the Court of Middlesex, and not elsewhere, and the Judge at the trial is bound to give effect to that provision.

Unthank, in reply. The mere fact of an act of Parliament being printed among the public general acts is no proof that it is a public general statute. The act for enabling the inhabitants of Grosvenor Square to pave, cleanse, light, water, and embellish the square, (14 Geo. 3, c. 52,) will be found among the public acts. An act of Parliament, private in its nature, is not made a public act by a clause declaring that it shall be deemed and taken to be so; *Brett* v. *Beales*. (*a*) The title of 14 Geo. 3, c. 78, as well as the 33rd & 37th sections clearly shews, that it is confined to the particular localities there mentioned.

Then as to the venue, that matter should have been pleaded. A statutory plea may be good, although it be not a denial or confession and avoidance; for instance, the plea of the Statute of Limitations. The meaning of the 100th section is, that the jury are to find for the defendant in cases where the objection is taken by plea. Besides, it appears that the wall in question was not a party wall; so that the trespass complained of, cannot be said to have been done in pursuance of the act; *Edge* v. *Parker* (*b*); *Knight* v. *Turquand* (*c*); *Cook* v. *Leonard* (*d*); *Jones* v. *Gooday* (*e*).

Cur. adv. vult.

(*a*) 1 M. & Mal. 421.
(*b*) 8 B. & C. 697.
(*c*) 2 M. & W. 101.
(*d*) 6 B. & C. 351.
(*e*) 1 Dowl. 914, N. S.; S. C. 9 M. & W. 736.

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PARKE, B.—This was a case which came before the Court on points reserved on an award. It appears, that an action of trespass was brought for building upon a wall, and that it was referred to an arbitrator, who, at the request of either party, was to state any points of law for the decision of the Court of Exchequer. The arbitrator finds that the writ of summons was issued on the 14th of June, 1844, and that the venue was laid in the county of Surrey. The declaration consists of four counts in trespass: the defendant pleaded not guilty, with the words "by statute" in the margin of the plea, and issue was joined on that. The statute relied on was the Building Act, 14 Geo. 3, c. 78, and the award then finds, that the houses of the plaintiff and defendant adjoin, being separated by a wall, which had existed for several years; that an addition was made to this wall by building upon it at both ends. In the year 1844, the trespass was committed, by building on this wall. The award then finds, that the wall is in the county of Surrey, and was within the district over which the provisions of the act 14 Geo. 3, c. 78, extended; but that the premises were not in the city of London or the liberty of the city of London; and that the wall, upon which the building took place, was not a party fence wall, nor a party wall, nor a wall in common between them, but was entirely standing on the land of the plaintiff, and was his wall exclusively. The addition was made to each end of the wall, which was exclusively the property of the plaintiff, by building on the wall; and in making the addition at both ends, the defendant bonâ fide believed the wall to be a party wall, and bonâ fide intended to comply with the provisions of the Building Act. Before the commencement of the action, the plaintiff gave a notice sufficient to satisfy the provisions of the 100th section of the Building Act, and commenced his action within three calendar months. The venue was laid in the county of Surrey, and the questions which the arbitrator has been requested by one of the parties to raise for the opinion of the Court of Exchequer are, first, whether the statute 5 & 6 Vict. c. 97, or the statute 7 & 8 Vict. c. 84, takes away from the defendant the power of

pleading "not guilty, by statute," under the 14 Geo. 3, c. 78? Supposing the Court to be of opinion that the above statutes did not take away the power of pleading not guilty; then the next question for the opinion of the Court was, whether the defendant was entitled to the protection of the statute by pleading the general issue, and giving the matter in evidence, although the said wall, which was built upon, and added to by the defendant, was not a party wall or fence wall, and although the venue was improperly laid, as it ought to have been laid in Middlesex. If the Court should be of opinion that the above statutes, or either of them, applied, it may not be material to advert to this point. Then the arbitrator directs that the verdict for the plaintiff shall be set aside, and the verdict entered for the defendant in lieu thereof, if the Court should, on such application, be of opinion, that the above statutes, or either of them, have not taken away from the defendant the power of pleading "not guilty," and of giving the special matter in evidence. The arbitrator then directs, that if the Court of Exchequer should think, that upon the common plea of "not guilty" the defendant was entitled to avail himself of the objection, under the provision of the 14 Geo. 3, c. 78, s. 100, that the venue was laid in Surrey, and not in Middlesex, the verdict entered for the plaintiff was to be set aside; but if the Court were of opinion, that he was not able to avail himself of the objection that the venue was laid in Surrey, then he awarded, that the verdict entered for the plaintiff should stand, and that the damages in the declaration should be reduced to 40*s*.

The first question which the arbitrator refers to us is, whether the right of pleading the general issue, and giving the special matter in evidence, given by the statute 14 Geo. 3, c. 78, is taken away by the statute 5 & 6 Vict. c. 97. We, who heard the argument, My *Lord Chief Baron*, my *Brother Platt*, and *myself*, all agree that the right was taken away. That statute provides, in section 3, "that so much of any clause or provision in any act or acts, commonly called public, local and personal, or local and personal, or in any act or acts of a

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local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same," shall be repealed. The act of the 14 Geo. 3, c. 78, was not an act "commonly called public, local and personal." That designation did not take place until long after the statute passed. On the 1st of May, 1797, the House of Lords resolved, that the Queen's printer should class the general statutes, and special and public, and local and private, in separate volumes; and on the 8th of May, 1801, there was a resolution of the House of Commons, agreed to by the House of Lords, that the general statutes, public, local and personal, in each session, should be classed in separate volumes: that was the commencement of that division of the statutes. The question, however, is, whether the act does not fall within the description of an act "of a local and personal nature." It seems singular that the 7 & 8 Vict. c. 84, should not have been classed among public, local and personal acts; for it is confined in its operations to districts in and about the metropolis, with power to her Majesty to extend its limits. How this has happened cannot be explained, for it is clearly of a local and personal nature, local in being confined to local limits, and personal as affecting a particular description of persons only, as distinguished from that of all the Queen's subjects. The 14 Geo. 3, c. 78, is of the same character in its general scope, the only doubt that can be raised as to its being of a local and personal character is, that it is not of a local and personal character only, as some of the clauses affect all the Queen's subjects, namely, the 84th and 86th relating to accidental fires, and the statute is in that respect public. If the defence in the action arises out of either of these clauses, it would probably be held that the statutable plea was not taken away; but the defence in this case arises under that part of the act which is not public. In all other respects than as far as it relates to accidental fires, the act falls under the category of a statute of a local and personal nature; and we, therefore,

all agree that the statutable plea of the general issue, which enables the party to give the special matter in evidence, was taken away in this case.

The only remaining question, which according to the finding of the arbitrator becomes material, is, whether the non-compliance with the requisites of the statute 14 Geo. 3, c. 78, could be given in evidence under the ordinary plea of "not guilty." Unless the privileges are meant by that statute to be available to the defendant as a good defence without pleading, or independent of the form of plea, as want of an apothecary's certificate has been held to be, the defendant cannot avail himself of the defence on a plea of "not guilty," which merely denies the fact of a trespass having been committed. We think, too, that the meaning of the clause on which the question arises is, that under the plea of not guilty given by the statute, the non-compliance with the form prescribed would be a defence; but not generally, whatever the form of plea might be. That section is the 100th, which enacts, "that no action, or suit, shall be commenced against any person or persons for anything done in pursuance of this act," &c. (His Lordship here read the clause). "The defendant may plead the general issue, and give this act and the special matter in evidence at any trial or trials to be had thereupon." The special matter, which the defendant is permitted to give in evidence, consists of all that the statute makes a defence; that is, either that the act was done by the authority of the statute, and then the defence is complete; or, that it was done in pursuance of it, in the sense properly given by the addition of those words; in which case there may be a defence, if the defendant proves, that there was a sufficient tender of amends, or, that the plea was within the statutable limits, and that the venue was wrong, or unless the plaintiff prove that the action was commenced in due time, which will primâ facie appear by the record, or that he gave a notice as required by the act. We think that none of these defences are available except under the statutable plea of not guilty,

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and that the right of giving evidence of special matter under that plea being taken away, the defendant must plead such matter specially in order to avail himself of it.

The award, therefore, will stand as a verdict for the plaintiff, and the rule must be discharged.

Rule discharged.

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dc. 15 M W. 198.

PROUDFOOT *v.* POILE.

An action on an apprentice deed was referred to arbitration by order of nisi prius, together with two other actions, in one of which the infant apprentice sued by his next friend, the costs of the causes to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator awarded that the verdict in the above cause should be entered for the defendant, that the two other actions should be no further prosecuted, and that the infant should pay the costs of the reference and award. *Held*, that the award was not bad by reason of its directing an infant to pay costs.

THIS was an action of covenant on an apprentice deed, and having come on for trial, was referred to arbitration, together with two other actions, in one of which the infant apprentice sued by his next friend; the costs of the causes to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator, who was to certify to whom and by whom the same were to be paid. The submission contained a clause, enabling the Court to order the award to be amended. The arbitrator awarded that the verdict in the above cause should be entered for the defendant, that the two other actions should be no further prosecuted, and that the infant should pay the costs of the reference and award.

Humfrey had obtained a rule nisi to set aside the award on the grounds, first, that the arbitrator had exceeded his authority in ordering an infant to pay costs; secondly, that the award was not final, inasmuch as the costs of the reference were ordered to be paid by a person who was no party to the cause.

Lush shewed cause. The arbitrator had power to order the costs to be paid by any one party to the reference. A submission to arbitration by an infant is voidable only, not void. After he is of age he may apply to set it aside, but if he does not, he admits that he was a competent party to the reference, and that the arbitrator had jurisdiction over

him. So far as regards the infant himself, the Court cannot entertain the application; if he be not a party, he has no right to object to the award; if he be, he is bound by the submission. The infant is substantially the plaintiff in all three actions; he is also one of three parties referring a matter in which they have a common interest, and giviug the arbitrator an unlimited power of determining by whom the costs shall be paid. The infant cannot say that the award is bad, for he is not bound to perform it; the plaintiffs in the other actions cannot object to the award, for they are not ordered to pay the costs. The Court called on

Humfrey, to support the rule. The submission must receive a reasonable construction. There is a reference of three actions, to one of which the infant is no party, and the costs of the causes are to abide the event; the costs of the reference and award are to be in the discretion of the arbitrator; the plain meaning of which is, that the costs of the reference and award of each particular cause shall be in the discretion of the arbitrator, in the same way as if it had been separately referred. [*Alderson*, B.—How is the arbitrator to divide the costs of the award? *Pollock*, C. B.—Suppose several causes are referred to the arbitrator to say by whom and to whom the costs are to be paid, and a person not a party to any one of the causes comes in by rule of Court, and makes himself a party to the reference, the arbitrator might direct him to pay the whole costs.] There would have been no difficulty in apportioning the costs according to the expenses of the different actions. [*Pollock*, C. B.—If there be any state of circumstances under which such an award could be made, that is enough to support it. Now suppose, in this case, the plaintiffs in the two actions admitted before the arbitrator that they had no cause of action, and the whole costs of the reference and award had been occasioned by the other plaintiff persevering in his action; could not the arbitrator make him pay all

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the costs?] Secondly, the arbitrator has exceeded his authority in ordering an infant to pay costs, inasmuch as he is a party who is not bound to pay them. An infant may at any time revoke the authority; and if he had not been ordered to pay the costs, it is impossible to say that some other one of the parties might not have been ordered to pay them. The arbitrator has not exercised the discretion which he was called upon to do. It is the same as if he had ordered a stranger to pay the costs. [*Rolfe*, B.—In that case the award would be bad on the face of it.]

POLLOCK, C. B.—I do not think we ought to interfere to set aside the award. It seems in every respect right, and if we thought otherwise, we should send it back to the arbitrator to amend it.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

COURT OF QUEEN'S BENCH.

Hilary Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

Ex parte GEORGE CRITCHLEY.

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Where a charge of embezzlement was pending before a magistrate, who entertained doubts whether a partnership did not exist between the prosecutor and the accused party: *Held*, that a warrant of attorney given to secure the payment of the monies charged to be embezzled, the charge being afterwards withdrawn, was invalid; as at the time of giving it, there was a charge of a criminal nature pending, which it was calculated to bring to an end.

A RULE had been obtained in last Michaelmas Term, calling on Thomas Turner to shew cause why a warrant of attorney, dated the 10th of October, 1845, and executed by George Critchley the elder, and others, should not be set aside, on the ground that it had been given for an illegal consideration.

The affidavit of George Critchley the elder, on which the rule was obtained, stated the following facts:—That in November, 1844, the deponent's son became a partner with Turner in the business of a shoemaker, and that the partnership lasted about eleven months. That on the 17th of September, 1845, Turner, under the pretence that the deponent's son was his servant and not his partner, caused him to be arrested and taken before a magistrate, on a charge of embezzlement. That the prisoner was several times remanded at the instance of Turner, in order to enable him to bring further evidence, and ultimately was admitted to bail to appear on a subsequent day. That prior to the last remand, an interview took place between the deponent, one Adwin, and Turner's attorney, at which

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the latter, in answer to questions put to him as to the nature of the charge against the prisoner, said there were several charges of a very serious nature, amongst which were some for receiving and embezzling money, and for altering invoices sent with goods; also one for stealing certain shoes, and various other charges, which would certainly send the accused out of the country; and that if Adwin wished to say anything about the matter he had better come alone, as he (the attorney) objected to any third party being present. That afterwards several other interviews took place between Turner, and his solicitor, and the deponent; and that it was ultimately arranged, that a certain sum of money should be paid down, and that security should be given for any further sum which might be found due from the accused to Turner; and that upon such security being given, the proceedings before the magistrate should be abandoned, and that Turner's attorney should acquaint the magistrate that the charge could not be sustained for want of sufficient evidence. That on the 13th of October, the warrant of attorney in question was accordingly given by the deponent, the accused, his sister and brother-in-law; and that on the 15th of October, to which day the examination of the charge had been adjourned, the attorney for Turner informed the magistrate, that counsel's opinion having been taken, it was found that the charge could not be sustained, and the prisoner was then accordingly discharged. The deponent also stated that he was induced to sign the warrant of attorney by his desire to save his son the disgrace of a trial, and under the belief that on an inspection of accounts he would not be called on to pay the warrant of attorney.

The affidavits in answer did not deny that the warrant of attorney was given to secure the payment of certain sums due to Turner from the accused, and that charges of embezzlement had been preferred; but denied that the warrant of attorney was given to compromise any charge of embezzlement. They stated that at an interview between

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the parties, account books had been produced, and that the accused had then admitted the sum for which the warrant was given to be due from him to Turner. That the defence set up before the magistrate was, that the accused and Turner were partners; and that the evidence that Turner himself had given before the magistrate was, that he had agreed with the accused that the latter should share the profits of the business with him, besides other advantages. That the magistrate himself had expressed great doubt whether, under the circumstances, the charge of embezzlement could be sustained, and that the charge of stealing was withdrawn before the settlement. One of the affidavits also stated, that at the time of the settlement the deponent well knew that "no felony was compounded or compromised, as the same had long before been abandoned, and never could be, or was proved, or substantiated, it being altogether doubtful whether any criminal charge whatever could have been legally established."

Pigott (with whom was *Crowder*) now shewed cause. It is not denied that a warrant of attorney given to compound a felony would be void; but here the affidavits shew that no felony has been committed; for the charge of embezzlement could not be sustained if the parties were partners, as the evidence shewed they were, and the charge of stealing the shoes was withdrawn before the warrant of attorney was given. It is not necessary to constitute a partnership that the parties should share the loss as well as the profit. If no felony had been committed, and the warrant of attorney was only given to secure a debt due from Critchley the younger to Turner, as our affidavits shew; it does not signify whether Turner had at one time proposed to treat it as a criminal charge. In *Ward* v. *Lloyd* (*a*) the ground alleged for setting aside a warrant of attorney was, that it was obtained from the defendant by

(*a*) 6 M. & G. 785; S. C. 7 Scott, N. R. 499.

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a threat of prosecution for felony; but it was held that that was no sufficient ground, unless it distinctly appeared that there was an agreement by the plaintiff, either express or necessarily implied, to abstain from prosecuting upon the security being given. Here we distinctly deny that there was any such agreement; the fact of the books being referred to, shews that the parties considered it as a civil, and not a criminal matter.

Petersdorff, in support of the rule. It is not necessary that there should have been an indictable offence committed, upon which a conviction might be obtained. It is sufficient that at the time there was a charge of a criminal nature pending; that the warrant of attorney was given for part of the monies included in that charge, and that that charge was afterwards withdrawn. The Court will see that if in a case like the present the warrant of attorney were held valid, nothing could be easier then for parties to defeat, in almost every case, the ends of justice. [He was then stopped.]

WILLIAMS, J.—It appears to me perfectly clear, when we attend to the dates and real nature of this transaction, that the illegality of this security is attempted to be hid under a very thin disguise. Mr. *Pigott* has presented the case as favourably as the facts would permit; but I think there is very little doubt at all. In the case which has been cited (*a*), the Court does not seem to have thought that there was any ground at all for assuming that any criminal proceedings were about to be taken. In the present case, on the contrary, it is not disputed that a criminal prosecution was pending at the time when the warrant of attorney was given. Now, what induced Critchley to give this warrant of attorney? If there had been anything to shew that the criminal prosecution had ceased, and that resort

(*a*) 6 M. & G. 785; S. C. 7 Scott, N. R. 499.

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was about to be had to civil proceedings for the purpose of recovering the money, there might then be some ground for supposing that the warrant of attorney was given for the purpose of settling such civil claim. That the books were referred to, seems quite consistent with the warrant of attorney being given to compromise the charge of embezzlement, as no doubt the parties would refer to them for the purpose of ascertaining the amount of the debt; for every embezzlement includes a debt as well as a felony. It seems clear, beyond a doubt, that there was a prosecution for a felony at the time pending, and that a doubt had arisen in the magistrate's mind as to whether a partnership existed between the parties or not. That being so, I cannot but see that the warrant of attorney was calculated to bring the proceedings to an end, and, as far as appeared at the time, to prevent the party from being subjected to a criminal prosecution. The rule must, therefore, be made absolute.

Rule absolute.

PROUD and Others *v.* MAYALL.

Debt for goods sold and delivered, work done, and materials provided, and on an account stated. The particulars of demand consisted of items for "medicines and attendances." At the trial, the plaintiffs' assistant proved that they were surgeons, and that he had visited and dispensed medicines to the defendant, and that on one occasion he had bled the defendant: *Held*, that primâ facie the charges were charges in a medical case; and that the plaintiffs were therefore bound to prove that they were certificated as apothecaries, or that they had been in practice previous to the 1st of August, 1815.

THIS was an action tried before the under-sheriff of Staffordshire, under a writ of trial, on the 7th of August last.

The declaration was in debt for goods sold, work done, and materials provided for the defendant, and on an account stated.

The defendant pleaded nunquam indebitatus, on which issue was joined.

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The particulars of the plaintiffs' demand were as follow:

"In the Queen's Bench.

"Between John Freer Proud, George Edwards, and Edward Hayling Coleman, plaintiffs,

and

James Mayall, defendant.

"This action is brought to recover the sum of 6*l.* 1*s.* 6*d.*, being the amount due on the following account:—

				£	s.	d.
1842.	January,	To bill for medicines and attendances		0	2	6
	June,	ditto	ditto	0	5	0
1843.	February,	ditto	ditto	0	2	0
	November,	ditto	ditto	0	12	0
1844.	January,	ditto	ditto	0	2	6
	February,	ditto	ditto	2	11	6
	March,	ditto	ditto	1	4	0
	April,	ditto	ditto	0	6	6
	May,	ditto	ditto	0	7	6
	September,	ditto	ditto	0	5	0
	October,	ditto	ditto	0	3	0
				£6	1	6

"Above are the particulars of the plaintiffs' demand in this action, for the recovery whereof they will avail themselves of the whole or any part of the declaration.

"Dated this 6th of June, 1845.

"Your's, &c.,

"C. B. TATTERSHALL,

"Plaintiffs' Attorney."

"To Mr. JAMES MAYALL,

"The above-named defendant."

It appeared upon the under-sheriff's notes, that the plaintiffs called a witness of the name of Bunch, who deposed that he was a surgeon and assistant to the plaintiffs, who were surgeons, and that his duty was to assist and dispense occasionally; that he had visited the defendant, and dispensed medicines; that on the 19th November, 1843, he had visited the defendant [bled him and gave medicines (*a*)], and that on the 11th of September, 1843, he had visited the defendant in the night; that he had dispensed medicines to the defendant's son; that he had made entries in the plaintiffs' books of medicines and attendances; and that he had no doubt the medicines and attendances charged, which amounted to 6*l.* 1*s.* 6*d.*, were respectively delivered and made. The only other witness called was the plaintiffs' errand boy, who spoke to the delivery of the medicines. On the part of the defendant it was submitted that the plaintiffs must be nonsuited, because they had not proved that they were certificated as apothecaries, or that they were in practice before the 1st of August, 1815; and also that there was no partnership proved (*b*). The under-sheriff overruled these objections; and a verdict was found for the plaintiffs for the amount claimed, with leave reserved to the defendant to move to enter a nonsuit on the above grounds.

A rule nisi had been accordingly obtained, on the production of the under-sheriff's notes, and on an affidavit of the defendant's attorney, who was present at the trial. The affidavit stated that on the defendant's attorney objecting that no item of a surgical bill had been proved, the plaintiffs' attorney contended that Bunch had said, in his examination, that he had bled the defendant. That thereupon, after the close of the plaintiffs' case, the witness Bunch was recalled, and said that he had so deposed in his examination in chief. That then the words "bled

(*a*) These words were interlined.

(*b*) Nothing turned on this last objection.

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him and gave medicines" were inserted in the under-sheriff's notes; but that to the best of the deponent's belief no such words were uttered by the witness in his examination in chief.

In answer to this rule, an affidavit was made by the plaintiff's attorney and by Bunch, that Bunch had so stated in his examination; and Bunch deposed that he had examined the items to which the particulars applied, and that some of the entries and items related to work, care, attendance, and medicine done, bestowed, and provided by the plaintiffs in their profession and practice as surgeons to, for, and on behalf of the said defendant; that is to say, for bleeding the said defendant, and for examining and treating the wife of the defendant for or in respect of a certain disease or affection called an uterine affection.

Whitehurst shewed cause. The plaintiffs in this action are surgeons, and therefore the case does not come within the 21st sect. of the 55 Geo. 3, c. 194, which enacts "that no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial, that he was in practice as an apothecary prior to, or on the said fifth day of August, one thousand eight hundred and fifteen, or that he has obtained a certificate to practice as an apothecary from the said master, wardens, and society of apothecaries as aforesaid." The 29th sec. expressly enacts, "that nothing in this act contained shall extend or be construed to extend to lessen, prejudice or defeat, or in anywise to interfere with any of the rights, authorities, privileges, and immunities heretofore vested in and exercised, and enjoyed by, either of the two universities of Oxford or Cambridge, the Royal College of Physicians, the Royal College of Surgeons"—"but the said universities, royal colleges," &c., "shall have, use, exercise, and enjoy all such rights, authorities, privileges, and immunities, save and except as aforesaid, in as full, ample, and beneficial a manner, to all intents and purposes,

as they might have done before the passing of this act, and in case the same had never been passed." In *Simpson* v. *Ralfe* (*a*), which was an action by a surgeon for attendances and medicines dispensed in a surgical case, *Bayley*, B., said, in delivering judgment, "I do not see why he might not dispense medicines, as incident to his business in the course of attending a patient as a surgeon." The case of *Handey* v. *Henson* (*b*) shews that a surgeon and apothecary may recover as well for medicines as attendances; although an apothecary is not allowed to charge for both; *Towne* v. *Gresley* (*c*). In *Allison* v. *Haydon* (*d*), an action was brought by a surgeon for attendances in what was, strictly speaking, a medical case; and although the Court decided against his claim, they seem to have taken for granted that a surgeon was entitled to charge for attendances and medicines in a purely surgical case. Mr. Justice *Park*, in delivering judgment, says, "A chemist can only recover for medicines sold, not for advice or attendance; and a surgeon cannot charge for his attendance, or for administering medicine, except in cases within his own department." The question, therefore, simply is, whether the attendances and medicines in the present instance were administered in the course of a surgical case; and it is submitted that there was sufficient evidence to warrant the jury in concluding that they were, and therefore to support their verdict. The Court will not, therefore, disturb their verdict, particularly when we shew on our affidavits that the plaintiffs not only attended the defendant to bleed him, but also attended his wife in an uterine affection.

Pashley, in support of the rule. The case of *Allison* v. *Haydon*, simply decided that a surgeon could not charge for attendances in a purely medical case. The rest is a mere obiter dictum. In *Simpson* v. *Ralfe*, the evidence

(*a*) 4 Tyr. 325.
(*b*) 4 C. & P. 110.
(*c*) 3 C. & P. 581.
(*d*) 4 Bing. 619; S. C. 1 M. & P. 588.

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proved that the attendances were in respect of surgical cases, and that the plaintiff's attendances as a surgeon entitled him to the sum for which the verdict was given; and the jury there discarded all the items, except those for the plaintiff's surgical services. It is said that there was evidence in this case of surgical aid having been afforded, since the plaintiffs' assistant stated that on one occasion he had bled the defendant; but it is also clear that the surgical aid here was merely auxiliary to the medical attendances. Primâ facie the case, as presented to the jury, was within the statute. The plaintiffs left it uncertain whether the bill was not a bill for apothecary's charges, and therefore there was no case to go to the jury. The plaintiffs had no right, after their case was closed, and the objection taken to remedy the defect pointed out on the evidence; *Alldred* v. *Halliwell* (*a*). Nor can they now supply by affidavit defects in the evidence at the trial. Looking at the particulars in this case, it is clear that it was not intended to go for surgical charges. The plaintiffs shewed that they had attended and administered medicines. That was an apothecary's case, and the single instance of bleeding by itself must be taken only as ancillary to the medical case.

PATTESON, J.—It seems that the words "bled him and gave medicines" are interlined in the under-sheriff's notes. I do not know whether this was an after-thought, but it certainly seems to have been stated by the witness to get rid of the objection. I think these plaintiffs must blame themselves. If they claimed as for a surgical case, they should so have stated it in the particulars; instead of which they make their claim as for medicines and attendances. This is, therefore, primâ facie an apothecary's case; and with regard to the attendances, it is clear an apothecary cannot charge for both medicines and attendances. The latter may, therefore, be altogether dismissed; and then

(*a*) 1 Stark. 117.

the question is, whether a single instance of bleeding will turn these charges for medicines into medical charges ancillary to a surgical case. I think it will not, and that the rule for a nonsuit must, therefore, be absolute.

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Rule absolute (*a*).

(*a*) This case was decided in Michaelmas Term, 1845.

REGINA *v.* Justices of FLINTSHIRE.

A RULE had been obtained (*a*) calling upon the justices of the peace for the county of Flint, to shew cause why a writ of certiorari should not issue directed to them to remove into this Court all and singular orders made by them, or some of them, at the general quarter sessions of the peace held at Mold, in and for the said county, dated, &c., upon the appeal of J. Roden, against a certain order of affiliation, dated, &c., made upon the said J. Roden by W. J. and S. C. P., Esqrs., two of the keepers of the peace and justices of that county, whereby, &c.; together with the said original order of affiliation, and all other orders touching the same: or why a writ of mandamus should not issue directed to the said keepers of the peace and justices, commanding them to enter, or cause to be entered, as of the said general quarter sessions held at Mold, &c., on, &c., the appeal of the said J. Roden against the said order of affiliation with continuances, &c., and at, &c., to hear and determine the merits of the said appeal.

The 7 & 8 Vict. c. 101, s. 4, requires notice of appeal against an order in bastardy to be given within twenty-four hours "after the adjudication and making of any such order." On an appeal coming on to be heard, it appeared that the order, a copy of which was served on the putative father, was dated on the 24th of June, and that the service on the putative father was on the 27th of June, who, within twenty-four hours afterwards, gave notice of appeal. It was objected that this notice was too late; whereupon the appellants offered to prove that the order was not drawn up or signed till the 27th of June, and that the notice was consequently in time: *He'd*, that the sessions acted wrongly in refusing to receive this evidence, and the Court granted a mandamus to compel them to do so.

1 - Post R. 81.

(*a*) In Michaelmas Term, 1845.

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The following facts appeared upon the affidavits. On the 27th of May, 1845, Roden appeared before the petty sessions at Mold, in the county of Flint, having been summoned to answer the complaint of one Margaret Jones, who alleged that he was the father of a bastard child of which she had been delivered. The hearing was adjourned till the 24th of June, when the case was heard and an order made upon Roden, adjudging him to be the father, and ordering him to pay the sum of one shilling and sixpence weekly for the maintenance of the said child.

On the 27th of June, Roden was served with a copy of the order. On the same day he attended to enter into a recognizance, in order to appeal against the order; and upon his attorney observing that the order was informal, the clerk to the justices said that it was only the draft of the order which was served, and that he was not to rely on it. At a subsequent period of the same day, Roden was served with a fresh copy of the order, which was free from defects, but which was made on the same complaint and by the same justices, and bore date the 24th June. Within twenty-four hours from the last service, Roden gave notice of appeal to the mother, and entered into the proper recognizance to prosecute the appeal at the next sessions. At the next sessions accordingly the appeal was about to be entered, when a preliminary objection was raised, that no sufficient notice of the appeal had been given to the mother within twenty-four hours after the making of the order. On the part of Roden, it was urged that the notice given was in time; and evidence was tendered that the order, in point of fact, was signed by the justices on the 27th of June, and not on the 24th of June, on which day it bore date. The Sessions, however, refused to hear this evidence, and held that they must presume that the order was made on the day on which it bore date, and therefore that the notice on the mother was too late; and they consequently confirmed the order.

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Welsby and *W. Yardley* now shewed cause. This rule is granted in the alternative for a certiorari or a mandamus, which is unusual (*a*). The justices, however, had here acted rightly in rejecting this evidence, as the case of *Regina* v. *The Justices of Derbyshire* (*b*) shews that it is of no consequence when the order was actually signed, since it must be taken on a state of facts like the present to have been actually made at the sessions when pronounced; and that the time of giving notice runs, not from the date of service, but from the day when the order is made. In that case an order had been made for a rate under the Highway Act, by the third section of which a right of appeal is given, if notice be given "within six days after such order, judgment, or determination shall be so made or given as aforesaid." The order was drawn up in blank and signed by the justices at the time, but not filled up till afterwards; and the Court held that on that state of facts the order was properly taken to be made at the time when it was signed, and that the time within which notice was to be given ran from that date. In the present case, the order is made under the 7 & 8 Vict. c. 101, sec. 2 & 3, which enable the justices in petty sessions to summon the putative father of a bastard child to appear before them, and then to make an order on him for its maintenance and the costs, and to enforce the same by distress and commitment. The fourth section (*a*)

(*a*) The rule was so drawn up, in order to meet the possible case that the justices had made two orders, the first of which was defective. It appeared, however, on the affidavit in opposition to the rule, that there was no order signed previously to the 27th of June, and that the first order served was merely the unexamined draft of the order which was afterwards correctly drawn up.

(*b*) 1 Car., Ham. & Allen's New Sess. Cases, p. 645.

(*a*) Sect. 4. "That the justices in petty session as aforesaid may adjourn the hearing of the case as often as to them may seem fit; but no such order shall be made unless applied for at such petty sessions within the space of forty days from the service of the summons after the birth of the bastard child on the person alleged to be the father of such bastard child; and if within twenty-four hours after the adjudication and making

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enacts, that the putative father may appeal "within twenty-four hours after the adjudication and making of any order on the putative father as aforesaid." The order is made when the decision of the justices is pronounced, and cannot depend upon the fact of when the order is formally drawn up and served. Nor can such a construction be productive of hardship to the appellant, as the statute does not require he should state any grounds of appeal, and therefore every technical objection to the order is open to him.

Townsend in support of the rule. In *Regina* v. *The Justices of Derbyshire* (*a*), the words of the statute seemed to treat the adjudication and the making of the order as one and the same act. Here the words of the third section of the 7 & 8 Vict. c. 101 (*b*) seem to treat them as separate,

of any order on the putative father as aforesaid, such putative father give notice of appeal to the mother of the bastard child, and also within seven days give sufficient security, by recognizance or otherwise, for the payment of costs, to the satisfaction of some one justice of the peace, it shall be lawful for such putative father to appeal to the general quarter sessions of the peace to be holden after the period of fourteen days next after the making of the said order for the county, city, borough, or place for which such petty sessions may have been held; and the justices in such quarter sessions assembled, or the recorder, as the case may be, shall thereupon hear and determine such appeal, and shall order such costs to be paid by either party as to them or him may seem fit."

(*a*) 1 Car., Ham. & Allen's New Sess. Cases, p. 645.

(*b*) Sect. 3. "That after the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the

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and to contemplate the possibility of the one being made after the other. In *Rex* v. *The Justices of Cheshire* (*a*), Mr. Justice *Parke* observes (*b*):—"The moment the justices have put their hands and seals to it, meaning it to be an order, it is one, and must be subject to the same rules." That shews that it is an order, strictly speaking, only from the time when the justices have affixed to it their signatures and seals. If that be so, then the notice was in sufficient time, and the justices acted wrongly in refusing to receive the evidence tendered of the order having been made at a subsequent period to that on which it bore date; and this Court will grant a mandamus to compel them to enter and hear the appeal; *Regina* v. *The Justices of Flintshire* (*c*).

WILLIAMS, J.—It seems to me perfectly clear that the justices did not enter into the consideration of the essential and material question between the parties, namely, whether the notice of appeal had been given in due time. The statute requires that the notice should be given within a certain time after "the making" of the order. I think the word "making" of the order must be understood in its usual sense, and must mean an order properly made under

mother of the bastard child, or to any person who may be appointed to have the custody of such child under the provisions of this act, of a sum of money weekly, and of such costs as may have been incurred in the obtaining of such order, including, if they think proper, ten shillings for the midwife, and ten shillings towards the funeral expenses of the child, provided it had died before the making of such order; and if the application be made before the birth of the child, or within two calendar months after the birth of the child, such weekly sum may, if the said justices think fit, be calculated from the birth of the child, at a rate not exceeding five shillings per week for the first six weeks after the birth of such child; and in other cases such sum shall not exceed two shillings and sixpence per week from the time of the making of the application."

(*a*) 5 B. & Ad. 439; S. C. 2 N. & M. 827.

(*b*) 5 B. & Ad. 441.

(*c*) *Ante*, vol. 2, p. 143.

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the hands and seals of the justices. If that be so, as the appellants state they could have shewn that the order was made on the 27th of June, and the notice was given within twenty-four hours afterwards, which would have been in time; and it is not denied that the sessions refused to hear this evidence: I think that the sessions acted wrongly; and that this rule for a mandamus must, therefore, be absolute.

Rule absolute.

REGINA *v.* G. W. BLATHWAYT and HENRY BUSH, Esqrs.

Where an order of removal is apparently defective on the face of it, as not shewing jurisdiction on the part of the justices making it; the parish on whom the order is made, need not appeal to the Court of Quarter Sessions, but may come in the first instance to this Court for a certiorari.

7. 26. 535

THIS was a rule calling upon G. W. Blathwayt and Henry Bush, Esqrs., two of the keepers of the peace and justices in and for the county of Gloucester, to shew cause why a writ of certiorari should not issue to remove into this Court an order under their hands and seals, made on the 4th of July, 1845, for the removal of one Francis Smart and Emma his wife, and their two children from the parish of Chipping Sodbury, in the county of Gloucester, to the parish of Alderley, also in the same county.

The order was in the following form:—

"To the churchwardens and overseers of the poor of the parish of Chipping Sodbury, in the county of Gloucester, and to the churchwardens and overseers of the poor of the parish of Alderley, in the county of Gloucester, and to each and every of them."

Gloucestershire, to wit. } Whereas complaint hath been made unto us, whose names are hereunto set and seals affixed, being two of her Majesty's justices of the peace acting in and for the Sodbury division, in the said county of Gloucester, (one whereof being of the quorum) by the churchwardens and overseers of the poor of the said parish of Chipping Sodbury, that Francis Smart, Emma

his wife, and their two children, namely, Temperance Anna, aged about nine years, and Aaron, aged about five years, are come to inhabit, and are now inhabiting in the said parish of Chipping Sodbury, in the said county of Gloucester, not having gained a legal settlement there, nor having produced any certificate acknowledging themselves to be settled elsewhere, and that they are now actually chargeable to the same parish of Chipping Sodbury, and now receiving relief therefrom: we, the said justices, upon due proof thereof, as well by examination of witnesses, to wit, of Francis Smart and others, upon oath, as otherwise, and upon due consideration of the premises, do adjudge the same to be true, and that the place of the last legal settlement of the said Francis Smart, Emma Smart his wife, and their said two children, named and aged as aforesaid, is in the said parish of Alderley, in the said county of Gloucester. These are, therefore, in her Majesty's name, to require and order that if, within twenty-one days after you the said churchwardens and overseers of the poor of the said parish of Chipping Sodbury, shall have sent, by post or otherwise, unto the churchwardens and overseers of the poor of the said parish of Alderley, a notice in writing of the said Francis Smart, Emma Smart his wife, and their said two children, being so chargeable as aforesaid, together with a copy or counterpart of this order, and a copy of the examinations on which this order is made, no notice of appeal against this order shall be given by the churchwardens and overseers of the poor of the said parish of Alderley; or if notice of appeal shall be given within the twenty-one days aforesaid; then forthwith, after the time for prosecuting such appeal shall have expired (if the same be not duly prosecuted), or in case the same shall be duly prosecuted, then forthwith after the final determination of the same, if this order shall thereupon be confirmed; you the said churchwardens and overseers of the poor of the said parish of Chipping Sodbury, or some or one of you, or some proper person or persons to be employed by you,

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do remove and convey the said Francis Smart, Emma Smart his wife, and their said two children, from and out of your said parish of Chipping Sodbury, to the said parish of Alderley, and them deliver, together with this our order, or a duplicate or true copy thereof, unto the overseers of the poor there, or one of them, who are hereby required to receive and provide for them according to law.

"Given under our hands and seals, at Old Sodbury, in the said county of Gloucester, the 4th day of July, in the year of our Lord 1845.

"G. W. BLATHWAYT (L. S.)

"HENRY BUSH" (L. S.)

The following objections were stated to the order on the rule being granted (*a*): that it did not shew any jurisdiction on the part of the magistrates making the order, the words "acting in and for" being insufficient for that purpose; and it not being shewn on the face of the order that Chipping Sodbury where the paupers were, or Old Sodbury, where the order was made, were within the Sodbury division for which alone the magistrates professed to act; that the order was bad for being conditional, and that the provisions of the Poor Law Act could not be incorporated in the order.

It appeared upon affidavit, that the twenty-one days' notice of chargeability had been given and had expired without any notice of appeal. That the parishes of Chipping Sodbury and Alderley were both within the Chipping Sodbury Union, and that the paupers being inmates of the workhouse, were removed on the 5th of August by transferring the expense of their maintenance from the account of the one parish to that of the other. That the next quarter sessions were on the 14th of October, but that no notice of appeal had been previously given, nor was any appeal entered at those sessions. And that two

(*a*) In Michaelmas Term, 1845.

previous orders of removal to the like effect had been obtained, and were quashed at the sessions for technical defects.

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Symons shewed cause, and contended that a certiorari could not issue in a case like the present, before an appeal had been made to the quarter sessions. The Court of Quarter Sessions is the statutory tribunal to which the parties should have recourse, and it is only in the event of its clearly appearing to this Court that justice has not been done by the inferior tribunal that they will issue a certiorari; *Rex* v. *Bass* (*a*). The granting a certiorari is a matter of discretion, though there are fatal defects on the face of the proceedings which it is sought to bring up; *Regina* v. *The Manchester and Leeds Railway Company* (*b*). The case of *Ex parte the Overseers of Tollerton* (*c*) shews that where an appeal against an order of removal has been entertained at the sessions, this Court will not grant a certiorari to bring up the prior proceedings such as the examinations. The defects alleged in this order may after all turn out to be defects in form; and if so, that is an additional reason why the parties were bound to appeal; for the statute 5 Geo. 2, c. 19, s. 1 (*d*), empowers the

(*a*) 5 T. R. 251.

(*b*) 8 A. & E. 413; S. C. 3 N. & P. 439.

(*c*) 3 Q. B. 792; S. C. 2 G. & D. 533.

(*d*) Sect. 1. "'Whereas in many cases where his Majesty's justices of the peace by law are empowered to give or make judgments or orders, great expenses have been occasioned by reason that such judgments or orders have, on appeals to the justices of the peace at their respective general or quarter sessions, been quashed or set aside, upon exceptions or objections to the form or forms of the proceedings, without hearing or examining the truth and merits of the matter in question between the parties concerned,' therefore to prevent the same for the future,"—"be it enacted,"—"that after the twenty-fourth day of June, 1732, upon all appeals to be made to the justices of the peace at their respective general or quarter sessions to be holden for any county, riding, city, liberty, or precinct, within that part of Great Britain called England, against judgments or orders given or made by any justices of the peace as aforesaid, such justices so assembled

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justices to amend all such defects in form. The inconvenience of acceding to such applications as the present is manifest, as this Court may be called upon to transact all the ordinary business of the Court of Quarter Sessions. In the case of *Rex* v. *Inhabitants of Uttoxeter* (*a*), it was held that a certiorari would not lie to remove a poor's rate, the remedy being by appeal, or by action when a distress is made; and the case of *Rex* v. *Justices of Somerset* (*b*), is an authority to the same effect. [He referred also to *Anonymous* (*c*), and sought to distinguish *Regina* v. *Woollatt* (*d*), from the present case.]

Greaves, in support of the rule. The objections to this order are not mere technical defects, but go to the substance of the order, as shewing it to be made without jurisdiction. In 1 *Nolan on the Poor Laws*, pp. 581, 601, several cases are cited in which a certiorari will be granted to remove an order of removal, where the defect is apparent on the face of it. It is true that by a rule of this Court, Reg. Gen., Easter Term, 1 Anne (*e*), it is ordered, "that no certiorari should be granted to remove orders of justices, from which the law has given an appeal to the sessions, before the matter be determined on the appeal, because it hinders the privilege of appealing; and if any order be removed before at any general or quarter sessions, shall and they are hereby required from time to time, within their respective jurisdictions, upon all and every such appeals so made to them, to cause any defect or defects of form that shall be found in any such original judgments or orders, to be rectified and amended without any costs or charge to the parties concerned; and after such amendment made, shall proceed to hear, examine, and consider the truth and merits of all matters concerning such original judgments or orders, and likewise to examine all witnesses upon oath, and hear all other proofs relating thereto, and to make such determinations thereupon as by law they should or ought to have done, in case there had not been such defect or want of form in the original proceeding; any law, usage, or custom to the contrary notwithstanding."

(*a*) 1 Bott's P. L. 292.

(*b*) 1 D. & R. 443.

(*c*) 7 Mod. 118.

(*d*) 2 Car., Ham. & Allen's New Sess. Cases, p. 5.

(*e*) Salk. 147.

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appeal, it should be sent down again." But that rule was explained by this Court, in the recent case of *Regina* v. *Woollatts*, to apply to cases only where the party seeking to bring it up by certiorari, is the party in whose favour the order is made. Besides, here the party is too late now to appeal, and the Court will consider that a strong reason why the writ of certiorari should not be refused. In the case of a bastardy order, it was never thought that a party was bound to appeal to the sessions first, in order to entitle himself to a writ of certiorari, where the defects were apparent on the face of the order. In the case of an indictment for a misdemeanor, a party was always entitled to a writ of certiorari, where the indictment was manifestly insufficient on the face of it, and was not bound to submit his objection in the first instance to the Court below. The case of *Rex* v. *Bass* (*a*), was one where the Court was convinced that the magistrates had come to a right conclusion on the whole facts of the case. In *Regina* v. *The Manchester and Leeds Railway Company* (*b*), it did not appear that the defects in the inquisition, which it was sought to remove, were sufficiently disclosed on the face of the affidavits. There can be no hardship on the other side, for if the order be held to be good, we shall have to pay the costs they are put to in opposing this rule. He referred also to *Regina* v. *The Justices of Sussex* (*c*).

Cur. adv. vult.

WILLIAMS, J.—This was an application for a certiorari to bring up an order of removal for defects apparent on the face of it. It was contended against the writ going, that it was discretionary with this Court whether it would issue it or not; and that as the party applying for it in the present instance had a remedy in his right to appeal to the Court of

(*a*) 5 T. R. 251.
(*b*) 8 A. & E. 413; S. C. 3 N. & P. 439.
(*c*) 1 M. & S. 631.

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Quarter Sessions, he could not waive that right and come, per saltum, to this Court for a certiorari to bring up the order. On consideration, however, I am of opinion that this objection is not a valid one. It is probably beneficial for both parties, and particularly for the removing parish, that this writ should issue; for supposing that a notice of appeal had been given and the parties had gone to the sessions, and the respondents had called witnesses to support their order, and the order had been confirmed; still a certiorari might have issued to remove the proceedings, and to quash the order for defects apparent on the face of it. Why then may it not go before any proceedings have been taken at the quarter sessions and expenses incurred there, when the very same grounds of objection to the order are taken now as would then be open to the appellants? No authority to the contrary has been produced, and, therefore, it seems to me, in reason, to be better for the removing parish that this course should be taken, when the preliminary steps at the sessions would be attended with unnecessary expense to the parish, who would probably be ultimately turned round on these very objections. I therefore think that the rule must be absolute for a certiorari.

Rule absolute.

In Re THOMAS FAIRTHORNE, Gent., one, &c.

Where an attorney arranged terms for the settlement of an action, and in pursuance thereof drew up a promissory note for the amount of the debt and costs, which the defendant signed; and also gave his own undertaking to guarantee the payment of the note with interest: *Held*, that this was an undertaking given in his character of attorney; although he was not the attorney in the action, and it was sworn by him that he was not acting as attorney for the defendant, and that he had not made any charge, or been paid anything for his services.

See post, 775.

THIS was a rule, which had been obtained in last Michaelmas Term, calling on Thomas Fairthorne, an attorney of this Court, to shew cause why he should not pay to George Bailey, or his attorney, the sum of 32*l.* 2*s.*, pursuant to his undertaking.

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From the affidavit in support of the rule it appeared that an action having been brought in January, 1831, by Bailey against one Robinson, to recover the amount of certain bills of exchange, an arrangement was made by Fairthorne, who, the affidavit stated, "acted as the attorney of Robinson" to settle the action, by Robinson's giving a promissory note for 20*l.*, the amount of the debt and costs, payable with interest, at the expiration of six months after the decease of his mother-in-law, Mary Savage; and which bill was to be guaranteed by the personal undertaking of Fairthorne. That Fairthorne accordingly drew up the promissory note with his own hand, which Robinson signed and delivered to Bailey, together with the following memorandum written and signed by Fairthorne;—

"Mr. George Bailey,

"Should the note of hand signed and delivered to you this day, by Mr. William Robinson, of St. Alban's, shoemaker, for the payment of 20*l.* and interest, at the expiration of six calendar months from the decease of his mother-in-law, Mrs. Mary Savage, be not paid on its becoming due; then and in that case I hereby engage and promise that I will, within ten days from the expiration of such six calendar months, pay you the said sum of 20*l.*, and all interest that may be then due thereon. As witness my hand this 28th day of May, 1831.

"THOMAS FAIRTHORNE.

"Witness, F. F. Y. WALLER."

Further proceedings were then stayed in the action. Mrs. Savage died on the 17th of January, 1842. The promissory note was never paid, and, with interest, amounted to 32*l.* 2*s.*; which sum had been demanded of Fairthorne, who had refused to pay it.

The affidavit in answer of Fairthorne shewed that he had been employed by the trustee under the will of the husband of Mrs. Savage, before the settlement of the pre-

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sent action, to prepare certain deeds, under which Robinson was entitled to a portion of the property after the death of Mrs. Savage. That he was applied to by Bailey, to corroborate the statement made by Robinson, that he was entitled to such property, and that he signed the undertaking in question at the request of Bailey, not with a view of guaranteeing the value, but merely the title of Robinson to such property. That Robinson had never received the money arising from such property, nor had any money of Robinson's ever come into deponent's hands. That he had never acted "as attorney" for Robinson in the settlement of the action; nor was in any way concerned therein, or in the settlement thereof, except as aforesaid; and that he had never previously acted in any matter or proceeding as attorney for the defendant. That no charge, "as he defendant verily believed," was ever made against the defendant, or anything ever paid by him or on his account to the deponent for preparing the note and undertaking, or for anything in relation to the action or the defence thereof. There was also an affidavit by the defendant Robinson, that he did not refer to Fairthorne as his attorney, but as the attorney concerned for the trustees under the will; and that he had at the time given an authority to Fairthorne, which was set out in the affidavit, to receive from the trustee under the will, whatever money he should pay to Bailey on his account.

Bramwell now shewed cause. Upon these affidavits it appears that the only instance in which it is suggested that Fairthorne acted as an attorney for Robinson, is the one in which he gave the undertaking in question. That being so, our affidavits meet the case, as thus presented, by an express denial that he acted on that occasion "as the attorney" of the defendant. That would be a sufficient answer in an ordinary case; but here we go further, and shew the circumstances from which the other side seek to infer that he gave this undertaking as attorney; and the

Court will see that the main fact relied on is his character as attorney. Several cases have, however, decided, that it is not sufficient to induce this Court to interfere that the party giving the undertaking is an attorney of the Court; unless it be distinctly shewn that he was acting in his character of attorney at the time he gave it; *Walker* v. *Arlett* (*a*); *Ex parte Schwalbanker* (*b*); *Ex parte Watts* (*c*); *Ex parte Cowie* (*d*); *Ex parte Clifton* (*e*).

Gray, in support of the rule. It is not contended that this undertaking could be enforced in a summary manner by this Court, except it were given by Fairthorne in his character of attorney. Here, however, he is found acting as he would necessarily have acted had he been the attorney of the defendant. He arranges the settlement of the action, draws up the necessary documents; and it was impossible for the plaintiffs to know that in so acting he was acting as a friend, and not as an attorney. The case of *In re Hilliard* (*f*) shews that the ground of this Court interfering to enforce undertakings, when given by attorneys, is less with a view of enforcing contracts on which actions might be brought, in a more speedy and less expensive mode; than with a view of securing honesty in the conduct of its officers, in all such matters as they undertake to perform, or see performed, when employed as such, or because they are such officers. Here the plaintiff settles with him, thinking he is the attorney of the defendant, because he finds him ostensibly acting as such; and it would be unfair now that the defendant has reaped the benefit of the arrangement, that the plaintiff should be told that Mr. Fairthorne was not acting as attorney. Mr. Justice *Coleridge*, in delivering judgment in the case above cited, says, "I have no desire to narrow the jurisdiction of the Court as

(*a*) 1 Dowl. 61.
(*b*) Ibid. 182.
(*c*) Ibid. 512.
(*d*) 3 Dowl. 600.
(*e*) 5 Dowl. 218.
(*f*) *Ante*, vol. 2, p. 919.

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to these undertakings on any such ground as the present; they are often most beneficially made for both parties in a cause, and there would be great injustice in letting the attorney loose from them, after the party has foregone the advantage or paid the price which was the consideration; while there is no hardship on the attorney in enforcing them; he is never compelled to enter into them; if he does, he should secure himself by his arrangement with his client, and he must be taken to know the legal consequences of his own act." That he has made no charge against the defendant in respect of his services, is a circumstance of no great importance; as most probably no charge would, in any case, have been made until the money was about to be paid; and as that was now not forthcoming, and the attorney was sought to be made liable on his undertaking, it would scarcely be probable that he would, by making a charge against the defendant, offer a fresh proof of his liability. [*Williams*, J.—I do not think you need dwell on that point; for supposing even that he had acted on the terms of payment only in case of success, he would have been equally acting as attorney.]

Cur. adv. vult.

WILLIAMS, J.—This was a rule calling on an attorney of the name of Fairthorne to pay a sum of money pursuant to his undertaking. The undertaking was set out in the affidavits, and there was no question that the undertaking was given. The only question was, whether it was given by Fairthorne in his character of attorney?

There is no doubt that if a man give an undertaking, the mere fact of his being an attorney does not make it an undertaking as attorney, so as to render him amenable to the summary jurisdiction of this Court. For instance, if a party make a compromise with another and want a surety, and go to an attorney, who signs one for him; it would

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be absurd to say that the rule applied to such a case. Therefore the question is, in each particular case, a question of fact, whether the undertaking has been given as attorney in the transaction in dispute. In a case later than any of those which have been cited (*a*), and to which my attention has been called by the Master, my Brother *Coleridge* said, "The question is, has the undertaking which it is sought to enforce, been given by the attorney in his character of attorney in the transaction in dispute?" In that case there was no action pending, so as to designate the party as attorney in the cause; but the question was, did he, under all the circumstances, appear to have acted as attorney in the transaction? Here there is an action pending, but the question still is, was he or was he not acting as attorney in the transaction? for it does not appear that he was attorney in the action. Now, it appears beyond doubt, and is indeed uncontradicted, that he prepared a promissory note, and then drew up and signed his own undertaking, in pursuance of terms which had been proposed by him to settle the action. It seems to me that all this must be taken to have been done by him acting as attorney in this particular transaction, as it is evident that by giving the undertaking he was endeavouring to settle the action. I therefore think that this rule must be made absolute.

Rule absolute.

(*a*) *In re Gee, ante*, vol. 2, p. 997.

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A ca. sa. was issued against both defendants on the same day that final judgment was signed; and one of the defendants was taken under it, and subsequently discharged under the Insolvent Act. The plaintiff instructed the sheriff not to execute the writ against the other defendant, and the writ remained in the sheriff's hands unreturned: *Held*, that a writ of fi. fa. which was issued against the goods of the other defendant more than a year from the date of the judgment, was not irregular, for want of the writ of ca. sa. being previously returned, or of a scire facias being issued to revive the judgment.

THIS was a rule which had been obtained on behalf of the defendant Beale, calling on the plaintiff to shew cause why a writ of fieri facias issued in this cause against him, and all subsequent proceedings, should not be set aside for irregularity, with costs; on the ground that it had been sued out more than a year after judgment, and that no scire facias had issued to revive the judgment.

The following facts appeared upon affidavits. Final judgment was signed in the above action against both defendants on the 8th of June, 1843, and on the same day a writ of ca. sa. issued against both the defendants. Upon this the defendant Hodgkinson was taken, and was discharged under the Insolvent Act, in or about the month of August in the same year, 1843. An arrangement was however made with Beale, the other defendant, in consequence of which the sheriff was instructed not to execute the writ of ca. sa. as against him, and the writ still remained, at the time of obtaining this rule, unexecuted in the sheriff's office. Beale did not subsequently observe the terms of the arrangement, and the present writ of fi. fa. was consequently issued against his goods, on the 17th of January, 1846, in the present Term, without any writ of scire facias having issued to revive the judgment. Under this writ the goods of the defendant, Beale, were taken in execution. In consequence of a claim made to these goods by the father of Beale, the sheriff took out a summons under the Interpleader Act; which summons was attended by the defendants' attorney, and the hearing of which was adjourned till the present rule was disposed of.

Pigott shewed cause. In *Greenshields* v. *Harris* (a), *Parke*, B., in delivering judgment, says, "A writ of ca. sa.,

(a) 2 Dowl. 272, N. S.; S. C. 9 M. & W. 774.

unlike those writs, the duration of which is limited by the Legislature, runs until it is executed. If, indeed, the plaintiff has neglected to take any step until more than twelve months after the judgment, the case is different, but if he sues out a writ, it runs until it is executed." The writ of ca. sa. therefore, in the present case, having regularly issued, and remaining unexecuted, is still in force, and may be at any time returned by the sheriff, with non est inventus, so as to make up the record. A writ of fi. fa., and another of ca. sa., may issue together against the same defendant in respect of the same judgment; *Primrose* v. *Gibson* (*a*); unless, indeed, some part of the amount be levied, and then the plaintiff cannot proceed under another writ, until the first be duly returned. Or a writ of fi. fa. may issue before the return of a writ of ca. sa. previously issued, if the latter writ have not been executed, or conversely; *Dicas* v. *Warne* (*b*). And even where the sheriff had seized the goods under a fi. fa., but had withdrawn from possession on the defendant's informing him "that he had sold the goods to cheat the plaintiff;" it was held, that as nothing had been done under the writ, it was unnecessary to return it before issuing a ca. sa. for the same debt against the defendant; *Knight* v. *Coleby* (*c*). Nor does it make any difference that in the present case the defendant, Hodgkinson, was taken in execution, and discharged under the Insolvent Act; as his discharge was no satisfaction of the plaintiff's claim against Beale; nor could it operate as a discharge of Beale also, so as to bar the plaintiff's execution against him; *Nadin* v. *Battie* (*d*); *Raynes* v. *Jones* (*e*). A judgment recovered against one of two co-contractors, is a bar to an action against the other, without alleging satisfaction (*f*): but it is not so where the judgment is against both,

(*a*) 2 D. & R. 193.
(*b*) 10 Bing. 341; S. C. 3 M. & Scott, 814; 2 Dowl. 762.
(*c*) 5 M. & W. 274.
(*d*) 5 East, 147.
(*e*) 9 M. & W. 104; S. C. 1 Dowl. 373, N. S.
(*f*) *King* v. *Hoare*, *ante*, vol. 2, p. 382; S. C. 13 M. & W. 494.

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and only one is taken in execution; *Dyke* v. *Mercer* (*a*). In such a case satisfaction must be alleged. The recent case of *Harmer* v. *Johnson* (*b*), shews that on final process one writ may issue in continuation of another at any time, and that it is not necessary to connect them by continuances as under the old form.

Petersdorff, in support of the rule. No case has been cited to shew that where one of two defendants has been taken under a ca. sa., execution of a different kind can issue against the other defendant, after the lapse of a year, without the first writ being duly returned. The case of *Simpson* v. *Heath* (*c*) only shews, that where a writ of ca. sa. issues within a year of the judgment, but is not executed till after that period has elapsed, it is not necessary that it should be returned and filed within the year, or that a scire facias should have issued to revive the judgment. In *Harmer* v. *Johnson*, a Judge's order was obtained by consent for the issuing the writ; and there, also, there was this marked distinction from the present case, that nothing had been done under the writ; whereas here one of the defendants has been taken in execution. In *Lush's Pract.*, p. 500, it is said, "The writs of fi. fa., ca. sa., and elegit, may all be sued out at the same time, or several of each issued at the same time into several counties, since it is not necessary to enter them on, or even to carry in the roll, until one has been executed, and it becomes necessary to issue another. But when either writ has been effectually executed, nothing can be done on another till the first has been returned." If, however, the Court should be of opinion that the writ of ca. sa. was not effectually executed; then it is submitted, that as the defendant Hodgkinson, who was arrested under the ca. sa., was discharged by operation of law, and as the sheriff was directed not to execute the writ as to the other

(*a*) 2 Show. 394.
(*b*) *Ante*, p. 38; S. C. 14 M. & W. 336.
(*c*) 7 Dowl. 832; S. C. 5 M. & W. 631.

defendant; it is the same as if no writ of ca. sa. at all had been issued: and if so, the writ of fi. fa. is clearly irregular.

Cur. adv. vult.

WILLIAMS, J., afterwards delivered judgment (*a*).—This was an application to set aside a writ of fi. fa., upon the ground that more than two years had elapsed since any step had been taken in the cause, and that, therefore, a writ of scire facias was necessary to revive the judgment, in order to authorize the issuing of the said writ of fi. fa. in this case.

The facts of the case are as follows. Final judgment was signed against both defendants on the 8th of June, 1843, and on the same day a writ of ca. sa. issued against both defendants. Upon this writ the defendant, Hodgkinson, was taken, and was discharged under the Insolvent Act, in or about the month of August in the same year, 1843. Against the other defendant, the present applicant, nothing was done upon the said writ of ca. sa., but the same was unexecuted, and still remains in the sheriff's office so unexecuted as to him, the defendant in question.

Now the first observation to be made is, that the writ of ca. sa., a writ in execution sued out in due time (as was the case here), with reference to the judgment, does not expire by lapse of time, as in mesne process, where the duration is limited; but such writ of ca. sa. remains in force until executed. This, I apprehend, is quite clear, and stands in need of no authority; but it may be mentioned, that this is assumed as a principle in the case of *Greenshields* v. *Harris* (*b*), to which I shall have occasion to refer upon a point more immediately bearing upon the case.

And the question now arises, whether, in order to justify the issuing of the writ of fi. fa. (the writ in question), a return should have been previously made to the ca. sa., or

(*a*) In the Vacation after Hilary Term.

(*b*) 2 Dowl. 272, N. S.; S. C. 9 M. & W. 775.

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whether it be sufficient that materials exist for completing the roll, so as to warrant the issuing of the fi. fa. If an actual return by the sheriff be indispensable, as that has not been made, the fi. fa. is irregularly sued out; otherwise, if it be sufficient that materials exist for completing the roll. That there are such materials in the present case is clear; because, the writ of ca. sa. remaining in the sheriff's office unexecuted as to the present applicant, he (the sheriff) may return, as to him, non est inventus. Then, is that enough? And upon this, the important and material part of the case, I feel that I ought to be governed by the decision of the Court in the before-mentioned case of *Greenshields* v. *Harris* (*a*). This is the language of the Court.—"In this case, the writs *may* be regularly entered on the roll, and if there be materials to make the roll up, that is sufficient. The production of the writs with the sheriff's return thereon, is an authority for the officer to make up the roll."

I think, therefore, that the rule must be discharged, but without costs.

Rule discharged.

(*a*) 2 Dowl. 272, N. S.; S. C. 9 M. & W. 775.

TOULMIN *v.* ELGIE.

In a London cause, which stood for trial for the first sittings in Michaelmas Term, the plaintiff, on the 24th of November, gave notice of continuance to the first sittings after Term: *Held*, that although this was virtually a notice for the adjournment day, the 15th of December, and the plaintiff had therefore full time to countermand the first notice, and give a fresh notice of trial; that he was not bound to do so, and that the notice of continuance was sufficient.

THE venue in this cause being laid in London, and issue having been joined, the plaintiff gave notice of trial for the first sittings in Michaelmas Term, 1845, and the cause was accordingly entered for trial at those sittings. On the 24th of November the plaintiff's attorney served a notice of continuance in the following terms: "Take notice, that I do hereby continue the notice of trial given you in this cause to the sittings after the present Term." The cause

was not re-entered for trial, and the defendant, supposing that it would not be tried, took no steps to prepare for trial. Subsequently, however, he discovered that the cause was in the list for the adjournment day, the 15th of December, and he then wrote to the plaintiff's attorney, saying, that he should not attend the trial, as he was advised that the proceedings were irregular. The cause was accordingly taken as an undefended cause, and a verdict returned for the plaintiff.

A rule having been obtained calling upon the plaintiff to shew cause why the trial and verdict obtained, and all subsequent proceedings, should not be set aside for irregularity, with costs.

Gray shewed cause. This is the ordinary case of a continuance in a town cause, from one sittings to another, in which it is the invariable practice not to require a fresh notice of trial. That it was tried at the adjournment day is a circumstance arising from the arrangements of the Court with respect to its own business, with which the plaintiff had no concern.

Lush in support of the rule. The ground on which a fresh notice of trial is not required where the cause is continued from one sittings to another, is, that there is not sufficient time to give a fresh notice of trial; but wherever there is sufficient time to give a fresh notice of trial, there the rule of notice by continuance does not apply (*a*). Now the notice of continuance in a London cause to the sittings after Term, as none are held then, is in point of fact a notice of continuance to the adjournment day, and is

(*a*) See 1 *Chit. Archb. Pract.* p. 209, 7th ed., where it is said, "A notice by continuance, being nothing else in effect than a short notice of trial, is never adopted where there is time to countermand a former notice and give a new one, and, consequently, never used in country causes."

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always understood as such in the profession. If the present notice were then in fact a notice of continuance to the adjournment day, the former notice of trial should have been countermanded, and a fresh notice of trial should have been given; as there was sufficient time to do so, and the reason of dispensing with it no longer existed. He referred to *Tyte* v. *Steventon* (*a*).

WILLIAMS, J.—It appears to me that the circumstance of no business being transacted at the first sittings after Term makes no difference, and that the plaintiff had, therefore, a perfect right to continue his notice to those which were the next sittings. I do not see any inconvenience which can arise from thus holding; because, as Mr. *Lush* says, such a notice is understood practically to be a notice for the adjournment day. I think, therefore, the notice in this case was sufficient, and that the rule must, therefore, be discharged.

Rule discharged (*b*).

(*a*) 2 W. Bl. 1298.

(*b*) *Lush* afterwards applied on the merits to have the cause tried over again; and it was ultimately arranged that upon terms the rule should be made absolute.

1846.

HALLETT *v.* CRESSWELL.

A RULE had been obtained, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the keeper of the Queen's Prison, upon the ground that the plaintiff had failed to declare against him within a year from the return of the process.

The following facts appeared upon affidavit. On the 21st of July, 1838, the defendant, who was then in the custody of the marshal of the Marshalsea, was detained at the suit of the present plaintiff, by virtue of a writ of capias issued on the 20th of the same month, in an action of debt for 64*l.* 13*s.* 6*d.* and costs. From that time to the present the plaintiff had never taken any steps towards declaring against him, or any further proceedings whatever in the action. The defendant had never himself petitioned the Court for the Relief of Insolvent Debtors, or the Court of Bankruptcy, for his discharge; but in October, 1839, a creditor of the name of Harriet Hall, at whose suit the defendant was then in custody in execution, had petitioned the Court for the Relief of Insolvent Debtors, who had made an order, whereby all his real and personal estate and effects became vested in the provisional assignee of the said Court. By a rule of the same Court, the defendant was ordered to file his schedule within fourteen days. No schedule was however filed by the defendant, who remained in custody at the suit of the plaintiff and his other detaining creditors, up to the present time, without having made any payment or satisfaction whatever of their respective claims. A summons had been taken out before *Williams*, J., at Chambers, for his discharge, who refused, however, to make any order. The fact of that application, or the grounds on which the refusal of the learned Judge had proceeded, did not appear upon the affidavit. It had, however, been mentioned on the rule being obtained.

A prisoner, who, at the time of a vesting order made by the Court of Insolvent Debtors on the petition of a creditor, was entitled to his discharge, on the ground of the lapse of a year without the plaintiff's having declared against him, is entitled to his discharge, notwithstanding the 41st section of 1 & 2 Vict. c. 110.

7 Scott. 465.

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Pashley shewed cause. The affidavit should have shewn that an application had been made to Chambers, and on what grounds it was dismissed. [*Williams*, J.—The summons was mentioned when this rule was moved for. It was only stated at Chambers that the defendant was entitled to his discharge by reason of the plaintiff's not having declared for two Terms.] The 41st section of the 1 & 2 Vict. c. 110, is conclusive against the prisoner's right to be discharged. That section enacts, "that no prisoner whose estate shall, by an order under this act, have been vested in the said provisional assignee, shall, after the making of such order, be discharged out of custody as to any action, suit, or process, for or concerning any debt, sum of money, damages or claim, with respect to which any adjudication can, under the provisions of this act, be made, by or by virtue of any supersedeas, judgment of non pros, or judgment as in the case of a nonsuit, for want of the plaintiff or plaintiffs in such action, suit, or process proceeding therein." Here an order has been made vesting the defendant's estate in a provisional assignee; and, therefore, this is a case in which "an adjudication could be made" within the meaning of the act. The defendant cannot say that no adjudication could be made because no schedule was filed; for it was his duty to have filed one. It will be argued, perhaps, that this case comes under the 7th section, which enacts, "that every prisoner who at the time appointed for the commencement of this act, shall be in custody upon mesne process for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of Insolvent Debtors, shall be entitled to his discharge, upon entering a common appearance to the action." These two sections would certainly at first seem inconsistent with each other; but probably the 7th section was only designed to apply to cases actually occurring at the time the act passed. At any rate, the words "shall not have filed a petition to be discharged under the laws now in force for the relief of Insolvent Debtors" in the last cited section, may be con-

strued to include the filing a petition in invitum by one of the creditors.

Willes, in support of the rule. The only means which the party has of obtaining his discharge is by this summary application to the Court. The detainer was lodged in July, 1838, and in July, 1839, the year within which the plaintiff was bound to declare, by Reg. Gen., H. T., 2 Wm. 4, r. 35, had expired. That rule says, "a plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable." He was therefore entitled to his discharge by the plaintiff's default, before the order for vesting his estate in the official assignee was made, which was not till the 23rd of October, 1839; and the rule is clear, that a prisoner once supersedeable is always supersedeable. The 41st section does not apply to the present case. This is not an application by way of "supersedeas, judgment of non pros, or judgment as in the case of a nonsuit, for want of the plaintiff or plaintiffs, in such action, suit, or process proceeding therein," within the meaning of that section; for here the plaintiff is out of Court, and the latter part of that section treats him as if still in Court. Supposing the defendant had applied, after the lapse of a year, for judgment of non pros, the answer would have been, that the cause was out of Court. But even supposing that section to apply, sect. 7 still remains; and a reasonable construction must be put on the terms of the latter section. As to the summons at Chambers, this is not like the case of a party seeking to set aside a Judge's order. Here the Judge has merely refused to act. [*Williams*, J.—In the case of a prisoner, has he not a right to apply de die in diem for his discharge upon such materials as he can get?] He referred to 2 *Chit. Archb. Pract.* p. 1206, 7th ed., and to *Smith* v. *Goldsworthy* (*a*).

Cur. adv. vult.

(*a*) 2 Q. B. 717; S. C. 2 G. & D. 189.

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WILLIAMS, J.—This was an application to discharge a prisoner out of custody on the ground that the plaintiff had failed to declare against him for upwards of a year. Two points arise: first, whether in point of fact no proceedings have been taken against him for that space of time: secondly, if none have, whether the 41st section of the 1 & 2 Vict. c. 110, operated so as to take away the right he would otherwise have of being discharged. Now, upon the first point, there is no doubt at all that he is clearly entitled to his discharge, upwards of twelve months having elapsed without the plaintiff having taken any steps to proceed in the action. The other point is, whether the 41st section interferes with that right. Now, the 41st section runs thus: "that no prisoner whose estate shall by an order under this act have been vested in the said provisional assignee shall, after the making of such order, be discharged out of custody, as to any action, suit, or process, for or concerning any debt, sum of money, damages, or claim, with respect to which an adjudication can, under the provisions of this act, be made, by or by virtue of any supersedeas, judgment of non pros, or judgment as in the case of a nonsuit, for want of the plaintiff or plaintiffs in such action, suit, or process proceeding therein." It may be remarked, that here the defendant has not applied to the Insolvent Court at all; and that the proceedings there taken against him were taken in invitum. Whether that circumstance would prevent the 41st section from operating, it is unnecessary to inquire; for I am of opinion, that giving a fair construction to the terms of the act of Parliament, it cannot apply to a person like the defendant, who, at the time of the proceedings taken in the Insolvent Court, was entitled to his discharge by reason of the plaintiff not having declared against him for a year. I therefore think that this rule must be absolute.

Rule absolute.

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WILLIAMS *v.* WELCH and Another.

A writ of scire facias will issue to revive a judgment, although more than twenty years have elapsed since it was signed; if payments within that time have been made on account of it.

IN this case (*a*) a rule nisi had been obtained (*b*) for a scire facias to revive a judgment, which had been signed in Michaelmas Term, 1825. It appeared that the judgment was given as a collateral security for the payment of an annuity, and that payments of the annuity had been made within twenty years. (*c*).

Hoggins shewed cause. The judgment was twenty years old on the first day of last Michaelmas Term, that is before the present rule was obtained; and it is a settled rule that no scire facias will issue to revive a judgment on which no execution has issued, and which is more than twenty years old. The presumption of the law is, that after that lapse of time it has been satisfied. [*Williams*, J.—Have you any authority for saying that a scire facias will not issue on a judgment more than twenty years old?] It is so laid down in 2 *Chit. Archb. Pract.* p. 832, 7th ed., "that scire facias on a recognizance, or to revive a judgment, cannot be sued out after twenty years." The plaintiff may bring his action on the annuity deed, and, if he can prove payment within twenty years as alleged, that will rebut the presumption that the deed has been satisfied; but the Court will not now decide the question on affidavit. The 3 & 4 Wm. 4, c. 27, s. 40, only applies to securities charged on land.

Swann, in support of the rule. The rule that this Court will not issue a scire facias after the lapse of twenty years, is by no means an universal one. The defendant can plead payment to the scire facias, and rely on the lapse of

(*a*) Reported on another point, *ante*, p. 357.

(*b*) In Michaelmas Term last, on the 18th of November.

(*c*) The last payment was made in 1828.

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time as presumptive proof, from which the jury may infer that fact.

WILLIAMS, J.—It seems to me that it is not necessary for me to decide whether there be or be not an inflexible rule, as is alleged, that no writ of scire facias will be granted to revive a judgment after the lapse of twenty years: because here there have been payments of interest within the twenty years. That fact, I think, would take the present case out of the rule, even supposing that any such rule did exist. The rule will, therefore, be absolute.

Rule absolute.

CROSBIE *v.* HOLMES.

Action on the case. The first count was for selling manure, falsely and fraudulently representing it to be guano; alleging as special damage not only the injury to plaintiff's own lands and crops, but that he had been obliged to pay to several parties named, to whom he had resold it, compensation for the injury caused to their lands and crops. There was a second count similar to the first, upon another sale of another parcel of the manure. Before plea pleaded, a Judge's order was obtained, referring "all matters in difference between the parties in the cause" to an arbitrator; the costs of the action to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. It appeared that at the inquiry before the arbitrator a witness who had purchased or used some of the guano, was tendered on behalf of the plaintiff, to prove the special damage alleged in the declaration, but was objected to on the ground that he was not named in the declaration, and that his evidence was accordingly not received. The arbitrator, by his award, which was not expressed to be de præmissis, ordered the defendant to pay to the plaintiff a certain sum of money, and that the costs of the reference and award should be paid by the defendant: *Held*, that the award was bad, for not shewing whether the money was to be paid in respect of the action, or of any other matter in difference between the parties.

DECLARATION on the case. The first count stated that the defendant, upon the sale of certain manure by him to the plaintiff, had falsely and fraudulently warranted and represented the manure to be guano; whereas in truth and in fact the said manure or substance was not guano, but was an useless, hurtful, and deleterious substance, of no use or value to the plaintiff, as the defendant, at the time of such warranty and representation well knew, by means whereof the plaintiff not only used the said manure upon

4 D & L 592.
23 L J Q B 193 (ep)

his own lands, but sold certain quantities thereof to other parties, and warranted and represented to them that the same was guano, and that the said other parties used the same in manuring their lands. It then alleged as damage that the lands and the crops and herbage of the plaintiff and the said other persons were injured thereby, and that the plaintiff not only lost the benefit and advantage of his own lands and crops, but that he "hath become and now is liable to pay divers large sums of money, amounting, to wit, to 500*l.*, to divers of the said persons to whom he sold the said manure, and warranted the same to be guano as aforesaid, to wit, James Grierson," (here followed several other names) "as and for compensation and amends for the injury they have sustained in their fields and crops as aforesaid," &c. The second count was similar to the above, except that it was for another sale of another quantity of manure.

Before plea pleaded, the parties agreed to a reference; and a Judge's order was accordingly drawn up on the 6th of October, 1845, which ordered "that all matters in difference between the parties in this cause be referred to the award" &c., of H. B., &c., "and that the costs of this action shall abide the event of the award, and that the costs of the reference and award shall be in the discretion of the arbitrator."

The award recited the order of reference, and proceeded thus:—"Now I, the said H. B., having taken upon myself the burthen of the said reference, having examined upon oath all such witnesses as were produced before me, and having heard and duly and maturely weighed and considered the several allegations, vouchers and proofs before me, by and on behalf of the said Crosbie and Holmes respectively, do award, order and adjudge, that the said J. N. Holmes, his executors, &c., do and shall pay, or cause to be paid, unto the said J. Crosbie, on, &c., at, &c., the sum of 167*l.* 6*s.* 2*d.* And I do further order, that the costs of the said reference and of this my award, and all

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other costs connected therewith, shall be borne and paid by the said J. N. Holmes; and all other costs connected therewith shall be borne and paid by the said J. N. Holmes. And that the costs of the said J. Crosbie therein, including the sum of 12*l.* 12*s.*, which he hath paid to me for my charges herein, and for this my award, shall be paid to him by the said J. N. Holmes, at the time and place hereinbefore appointed for the payment of the said sum of 167*l.* 6*s.* 2*d.*"

A rule had been obtained in Michaelmas Term last, calling on the plaintiff to shew cause why the award should not be set aside on the following grounds (*a*): "that the arbitrator has not in or by the award disposed of or decided or awarded upon the action mentioned in the submission and order of reference: that it does not appear whether the sum awarded to be paid was a sum due in or by reason or in respect of the action, or was due in respect of other causes of action or matters in difference between the parties in the cause; and that the sum so awarded may be due in respect of the matters referred to in the affidavit of the defendant, other than matters in the cause, and that the defendant may have been entitled to succeed in the action, although the plaintiff was entitled to the sum awarded to be paid to him; and that the action is left subsisting and entirely undetermined, and that no damages are awarded therein, and that the award is uncertain, and not final, for the reasons aforesaid."

It was stated on the affidavit on which the rule was obtained, that the arbitrator had received evidence in respect of parties not named in the declaration in support of the special damage therein alleged; although such evidence was objected to by the defendant's attorney.

This was denied by the affidavit on the other side, which

(*a*) The rule was granted by *Patteson*, J., after taking time to consider, and was drawn up on reading the rule making the order of reference a rule of Court, the affidavit on which the application was founded, and a copy of the declaration and award.

shewed that only one witness was called whose name was not stated in the declaration, and that he was called to prove that he had purchased or used some of the guano; but that upon his evidence being objected to, the arbitrator did not receive it.

Heath (with whom was *Jervis*) now shewed cause. It is true that the order of reference comprehends *all* matters in difference between the parties, but it is not shewn by the affidavit that there were in fact any other matters in difference than those relating to the cause. The arbitrator, therefore, in ordering the defendant to pay the sum mentioned in the award, in effect decides the action in favour of the plaintiff. In *Gray* v. *Gwennap* (*a*), where there was a verdict found for the plaintiff in an action of tort, subject to a reference of all matters in difference in the cause, the defendant claimed before the arbitrator a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due; and an award, which was not stated to be made "de præmissis," directing a verdict to be entered for the plaintiff with damages, was held sufficient. There, it was contended, that the award only decided the action, and not all the matters in difference between the parties, it not being expressed to be made de præmissis: but the Court held that the fair meaning of the award must be that he had found the sum due after settling all accounts between the parties. So in the present case, although the award is not stated to be de præmissis, the Court will not, in the absence of any allegation to that effect in the affidavit, intend that there were other matters in dispute between the parties than those decided by the award. There are several cases indeed which shew that where distinct issues are raised, there must be an express finding on

(*a*) 1 B. & A. 106.

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each issue; *Kilburn* v. *Kilburn* (*a*); *In re Leeming* (*b*); *England* v. *Davison* (*c*); *Maloney* v. *Stockley* (*d*). But all those cases are distinguishable from the present, because here the cause was referred before plea, and, therefore, no issue was joined. In *Bearup* v. *Peacock* (*e*), the declaration contained several counts, and the cause was referred by order of a Judge before plea pleaded; and on motion to set aside the award, it was held that the arbitrator was not bound to find specifically upon each count in the declaration, but might find generally that the plaintiff had good cause of action for a certain sum, and award that the defendant should pay him that sum. The cases of *The Duke of Beaufort* v. *Welch* (*f*), and *Williams* v. *Moulsdale* (*g*), shew that if there be two constructions of an award, the Court will adopt that which will support it. If, however, the Court should be of opinion that this award cannot stand as a whole, the utmost that can be done is to set aside so much of it as relates to the costs of the action; for the defendant would not by possibility be entitled to more than these costs; *England* v. *Davison*; *In re Leeming*; *Maloney* v. *Stockley*; *Morgan* v. *Smith* (*h*).

Crompton, in support of the rule. It appears uncontradicted that there were other matters in difference between the parties; for it appears that a witness who had purchased some of the guano was called in support of the allegation of special damage in the declaration, and that his evidence was not received, merely because his name was not inserted in the declaration. It therefore lies upon the party sustaining the award to shew that the award

(*a*) 13 M. & W. 671; S. C. *ante*, vol. 2, p. 633.

(*b*) 5 B. & Ad. 403; S. C. *nom.* *Leeming* v. *Fearnley*, 2 N. & M. 232.

(*c*) 9 Dowl. 1052.

(*d*) 2 Dowl. 122, N. S.; S. C. 4 M. & G. 647.

(*e*) 14 M. & W. 149; S. C. *ante*, vol. 2, p. 850.

(*f*) 10 A. & E. 527.

(*g*) 7 M. & W. 134.

(*h*) 9 M. & W. 427; S. C. 1 Dowl. 617, N. S.

could not have reference to that matter (*a*). It is submitted, however, that this award is clearly bad. The reference is of "all matters in difference between the parties in this cause, the costs of the action to abide the event of the award;" and the arbitrator never so much as alludes to the action in his award. The event of the award must mean the legal event. There are two counts in the declaration: and the Master cannot tell upon this award, whether it was the intention of the arbitrator that the plaintiff or the defendant should recover the costs of the action; or whether in respect of both the counts, or only of one, and of which. The case of *Pearson* v. *Archbold* (*b*) strongly resembles the present. There the defendant in an action of assumpsit having pleaded non assumpsit, payment, and a set-off, and issues having been joined thereon, the cause and all matters in difference were by a Judge's order referred to arbitration, the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator awarded "that the plaintiff should pay to the defendant the sum of 16*l.* 10*s.* 2*d.*, being the balance which I find to be due from the plaintiff to the defendant;" and that each party should pay his own costs of the reference, and a moiety of the costs of the award. It was held upon motion, that the award was bad, on the ground of uncertainty as to the finding of the issues, and there being no adjudication at all upon the cause. Here the reference is of "all matters of difference between the parties in the cause," which is to the same effect. That the cause in the present case had not proceeded as far as plea pleaded and issue joined, can make no difference. In *Kilburn* v. *Kilburn* (*c*), the Court in delivering judgment said, "the award does no more than this: it determines that on some one or more of the counts in the declaration

(*a*) This point was not touched upon in the judgment.

(*b*) 11 M. & W. 477; S. C. 2 Dowl. 1018, N. S.

(*c*) 13 M. & W. 671; S. C. *ante*, vol. 2, p. 633.

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the defendant is liable; but it does not necessarily or even reasonably determine that he is liable on all or on any particular counts, so as to be equivalent to an express determination of the whole, or any definite part of the issue of non assumpsit in the plaintiff's favour." The same reason applies to the present case. In *Watson on Awards* (*a*), the rule is stated to be, that where the costs of the action are to abide the event of the award, "the arbitrator must make a determination of the suit in favour of one party or the other as to the several counts or issues." No distinction is there made between several counts and several issues; nor on principle, it is submitted, can any be supported.

WILLIAMS, J.—The objection is that the arbitrator has omitted to decide with respect to the action, which was clearly submitted to him, together with all matters in difference between the parties. The reference is "of all matters in difference between the parties in this cause," and "that the costs of the action shall abide the event of the award," &c. The award is, that the defendant should pay a certain sum of money to the plaintiff, and that the costs of the reference and of the award, and all other costs connected therewith, should be paid by the defendant. It is impossible to collect from this award whether this sum is to be paid in respect of the action, or of any other matters in difference between the parties. Unless, however, he has decided in respect of the action, and, moreover, that the plaintiff is entitled to recover in the cause, how can the costs, which were to abide the event of the award, be taxed for the successful party? In *Gray* v. *Gwennap* (*b*), a case often cited, the words de præmissis seem to have been considered of considerable weight in sustaining an award. Whether they would obviate the present objection it is immaterial to consider, as they do not occur here. I

(*a*) Page 161, 2nd ed.

(*b*) 1 B. & A. 186.

therefore think that the award leaves it uncertain in respect of what the finding is, and that the rule must therefore be made absolute.

Rule absolute.

PATRICK *v.* RICHARDS.

WARREN moved to make absolute a rule to compute. The affidavit stated the rule had been served on a Mr. Strick, "who acts as the attorney or agent for the defendant in this cause." He submitted that that was equivalent to a statement that the party served was the attorney.

An affidavit of service of a rule to compute, stated the service to have been on A. B., "who acts as the attorney or agent of the defendant in this cause:" *Held* sufficient.

WILLIAMS, J.—The service should be on the attorney in the cause; but I think this amounts to the same thing.

Rule absolute.

REGINA *v.* The Justices of SURREY.
(St. Anne, Westminster *v.* St. Mary Magdalen, Bermondsey.)

A RULE had been obtained, calling upon the justices of the peace for the county of Surrey, to shew cause why a writ of mandamus should not issue directed to them, commanding them to enter continuances, and hear an appeal against an order for the removal of Rebecca, the wife of Thomas Brown, and her two children, from the parish of St. Mary Magdalen, Bermondsey, in the said county, to the parish of St. Anne, Westminster.

A notice of appeal against an order of removal was in the following terms: "take notice, that we being a majority of and acting for and on behalf of the churchwardens and overseers of," &c., "and that the grounds of *our* appeal," &c., and was signed by one person, "churchwarden of," &c., and by four persons, "overseers of," &c. It appeared that there were two churchwardens and four overseers of the appellant parish, and no more. The quarter sessions having decided that the notice was insufficient, and refused to hear the appeal: *Held*, that the notice was good, as sufficiently shewing that it was an appeal by and on behalf of the whole body of parish officers; and that the decision of the quarter sessions on the point was a decision on a preliminary objection, and, therefore, that this Court would grant a mandamus, commanding them to enter continuances and hear the appeal.

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It appeared that a copy of the order, examinations, and notice of chargeability had been forwarded to the appellant parish by post, and that they had been received on the 16th of April, 1845. That at the July sessions following, which were held at Guildford, for the county of Surrey, the appeal was entered, and on its coming on to be tried, the appellants were called upon to prove their notice of appeal. That they called the clerk to the guardians of the appellant parish, who proved that he had served the following notice and ground of appeal upon the removing parish, fourteen clear days before the sessions:

"To the churchwardens and overseers of the poor of the parish of St. Mary Magdalen, Bermondsey, in the county of Surrey.

"Take notice, that we, being a majority of, and acting for and on behalf of the churchwardens and overseers of the poor of the parish of St. Anne, Westminster, in the county of Middlesex, do intend, at the next general quarter sessions of the peace to be holden in and for the county of Surrey, to prosecute an appeal, &c., bearing date, &c., whereby, &c. And also take notice, that the grounds of our appeal are, &c. And further take notice, that we hereby require you to produce at the hearing of the said appeal the said order of removal, dated the 15th day of April, in the year of our Lord 1845, together with the original examinations on which such order was made, and that at the hearing of the said appeal, we, on behalf of the said parish of St. Anne, Westminster, will avail ourselves of all or some one or more of the grounds of appeal herein stated. Dated this 11th day of June, in the year of our Lord 1845."

"F. FIELDER, } Churchwarden of the said parish of St. Anne, Westminster.

J. PENHALL,
W. ADDIS,
J. ADONS,
J. BUSAIN. } The Overseers of the poor of the parish of St. Anne, Westminster."

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It was then objected by the respondent parish, that the notice of appeal was insufficient; because it purported to give notice of an appeal by the majority of the churchwardens and overseers only, instead of by the whole body; and counsel having been heard on both sides, the quarter sessions decided that the objection was fatal, and refused to hear the appeal. It appeared that there were two churchwardens and four overseers in the appellant parish, and no more.

A rule, similar to the above, had also been obtained in another case of *St. Anne, Westminster* v. *Oxted*, in which the sessions refused to hear the appeal on the same grounds as the above.

Baldwin shewed cause (*a*). The Court of Quarter Sessions have decided that this notice was insufficient, and this Court will not interfere with their decision. In *Regina* v. *The Justices of Kesteven* (*b*), the question on which the sessions had decided was the sufficiency of a notice of grounds of appeal in its statement of the facts on which the appellants meant to rely; and this Court refused to interfere with their decision. And in *Regina* v. *The Justices of the West Riding*, (*Beckington* v. *Elland*) (*c*), where the sessions had refused to hear evidence on an appeal, on the ground that the examinations were deficient in particularity, this Court refused to interfere by mandamus. So in the present case, the question of whether the notice of appeal was sufficient, was a proper question for the sessions to determine; and having determined it, this Court will not interfere. The proper course for the appellants would have been, if they questioned the propriety of the decision, to have requested the sessions to state a special case for the opinion of this Court. The Court, in giving judgment in the last cited

(*a*) It was arranged that the second rule should abide the event of the first.

(*b*) 3 Q. B. 810; S. C. 1 D. & M. 113.

(*c*) 1 Car., Ham. & Allen's New Sess. Cases, p. 247.

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case, say, "all now understand, that when any such tribunal" (i. e. the Court of Quarter Sessions) "declines to exercise a jurisdiction imposed on it by the law, this Court will enforce its proceeding; but that when it has acted, its judgment can only be reversed here on a case stated by itself for our opinion. There is certainly no want of facility in granting such cases, and they are conveniently disposed of on grounds well understood between the parties, while the conflict of affidavits on such matters is of itself a real evil." Should, however, the Court think that the present is a case in which, supposing the justices to have wrongly decided, it would interfere by granting a mandamus; then it is submitted, that their decision was a right one, and that the notice of appeal was insufficient. It begins "we being a majority of, and acting for and on behalf of the churchwardens and overseers of the poor of the parish of," &c., and concludes with the signature of "F. Fielder, churchwarden of," &c., and of "J. Penhall," and three others, "the overseers of the poor of," &c. Now it is clear, that an appeal by a corporate body should appear to be the act of the corporate body, and not of the majority only; although the majority are enabled to give the notice. For it is not quâ the majority of the corporate body, but quâ the corporate body itself, that they have this power. Here the churchwardens and overseers, it is true, are not a corporate body, but for this purpose they stand on the same principle; *Rex* v. *Beeston* (*a*). It is true that the case of *Regina* v. *The Justices of the West Riding* (*St. Pancras* v. *Bradford*) (*b*), appears to be an authority against the view now submitted; but in that case, the notice was given by "we, the undersigned," and the words "being a majority" were merely descriptio personarum. In the present case, the statement of the grounds of appeal is, "take notice that the grounds of our appeal are," &c. The relative to "our" is "we, being a majority of," &c., "the church-

(*a*) 3 T. R. 592, 4. (*b*) *Ante*, p. 152.

wardens and overseers," &c. This case resembles in some respect that of *Ex parte Harnley* (*a*). There a party who was bound to sign a notice of appeal as "guardian," signed it as overseer, and the Court held the notice to be bad.

Pashley and *Corner*, in support of the rule. The case of *Regina* v. *The Justices of Kesteven* (*b*), does not apply. There the quarter sessions did hear the appeal, for they entered into the consideration of whether the grounds of appeal were sufficiently particular; and the respondent's case was opened, and a witness examined. So also in *Regina* v. *The Justices of West Riding* (*Beckington* v. *Elland*) (*c*), the point was as to the sufficiency of the examinations sent with the order of removal. The stat. 4 & 5 Wm. 4, c. 76, s. 81, prevents the respondents on the hearing of an appeal, from going into any other grounds of removal than those set forth in the examination. It would therefore be idle, where the sessions are of opinion that the grounds stated in the examination are not sufficient to sustain the removal, to force them to hear the appeal. A decision on an objection to the examinations has therefore been treated in the same light as a decision on the merits; *Ex parte Ackworth* (*d*), confirmed by *Regina* v. *St. Mary, Lambeth* (*e*). Here, however, a decision on the sufficiency of the notice of appeal, is a mere preliminary step to the appeal being heard. The statute requiring notice of appeal to be given, the 9 Geo. 1, c. 7, s. 8, enacts, that "no appeal—shall be proceeded upon," unless reasonable notice has been given. Therefore, it is clear the appeal has not been "proceeded upon," as the sessions decided that the notice was insufficient. So the 4 & 5 Wm. 4, c. 76, s. 81, enacts, that

(*a*) *Ante*, vol. 1, p. 673.

(*b*) 3 Q. B. 810; S. C. 1 D. & M. 113.

(*c*) 1 Car., Ham. & Allen's New Sess. Cases, p. 247.

(*d*) *Ante*, vol. 1, p. 718; S. C. 3 Q. B. 397, note (*a*).

(*e*) 2 Car., Ham. & Allen's New Sess. Cases, p. 36.

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it shall not be lawful for the overseers of the appellant parish "to be heard in support of such appeal," unless notice of appeal be given fourteen days at least before the sessions. Secondly, the notice in the present case was properly given by the majority of the parish officers. [They were then stopped.]

WILLIAMS, J.—I do not think you need argue that point; for I do not entertain any doubt whatever upon it. The notice is expressed to be given "for and on behalf of the churchwardens and overseers," and at the end come the names of one person signing himself as a churchwarden, and of four persons signing themselves as overseers. Taking the whole together, I do not think there can be any doubt that this notice is given by and on behalf of the whole body of churchwardens and overseers. As to the other point, I will look into the cases.

Cur. adv. vult.

WILLIAMS, J.—This was an application for a mandamus to enter continuances and hear an appeal against an order of removal, on the ground that the justices had improperly refused to hear the appeal, on an alleged insufficiency of the notice of appeal. I thought, when this case was discussed, that the notice of appeal was sufficient; but I hesitated in consequence of some late cases, which decide that where the sessions have once taken in hand the hearing of the appeal, this Court will not interfere with their decision. But on consideration I am clearly of opinion that there was no hearing of the appeal in the present case, and that this was a mere preliminary objection. Thus in *Rex* v. *The Justices of Gloucestershire* (*a*), where, on an appeal by one of two overseers against the

(*a*) 1 B. & Ad. 1.

accounts of his colleague, after one witness had been examined on the part of the respondent, an objection was taken that an appeal did not lie, and the sessions accordingly dismissed the appeal. On application to this Court for a mandamus, it was held that this objection in its nature was a mere preliminary one, that went to deprive the sessions from exercising any jurisdiction, and that, therefore, there had been no hearing, and that a mandamus should issue. And in a late case, *Regina* v. *The Justices of Kent* (*a*), the Court acted on this principle in issuing a mandamus to hear an appeal against an order of removal of a pauper lunatic, where the justices had refused to hear it, on the ground that the notice of appeal was insufficient. If these cases stood in need of any confirmation, I think the statute of 9 Geo. 1, c. 7, s. 8, is a strong confirmation of the correctness of this view; for it says, that if the justices shall find a reasonable notice has not been given, they are then to adjourn the case till the next sessions, and then and there to "finally hear and determine the same." It seems to me that the statute puts the "hearing and determining the appeal" in direct contradistinction to deciding on the validity of the notice. I therefore think that this rule must be absolute.

Rule absolute.

(*a*) 2 Q. B. 686; S. C. 2 G. & D. 152.

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(*In the full Court.*)

JC - 8. 2B. 338.

Assumpsit. The declaration alleged a promise to marry "within a reasonable time after the defendant should be thereunto requested by the plaintiff;" and without averring a request, stated for breach that the defendant had wrongfully married another person. Plea, that the defendant was never requested to marry the plaintiff: *Held*, on special demurrer, that the declaration was good, as shewing a breach of contract by the defendant, which dispensed with any necessity for alleging a request; and that the plea was consequently bad.

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ASSUMPSIT. That in consideration that the plaintiff being then unmarried, at the request of the defendant, had then promised the defendant to marry him, he the defendant then promised the plaintiff to marry her within a reasonable time next after the defendant should be thereunto requested by the plaintiff. And the plaintiff avers that she, confiding, &c., hath always hitherto remained and continued, and still is, sole and unmarried, and was always from the time of the making of her said promise until the marriage of the defendant as hereinafter mentioned, ready and willing to marry the defendant, whereof the defendant hath always had notice. Yet the defendant, disregarding his said promise, after the making thereof, and before the commencement of this suit, to wit, on, &c., wrongfully and injuriously married a certain other person, to wit, one, &c., contrary to his said promise, to the plaintiff's damage, &c.

Second plea. That the defendant was not at any time before the commencement of the suit, requested by the plaintiff to marry her according to his said promise in that behalf. Verification.

Special demurrer, assigning for cause, amongst others, that although the defendant by this plea confessed the promise and breach as alleged in the declaration, he had not avoided the same, but stated a fact immaterial to the merits of the action.

The points marked by the plaintiff for argument were, that the declaration was good, inasmuch as it alleged an act done, by which the defendant disabled himself from performing his promise, that he thereby dispensed with the performance by the plaintiff of the condition precedent,

(*a*) See this case, *ante*, vol. 2, p. 792.

viz. the request, which thenceforth became unnecessary, and would have been useless; that if a request had been alleged, it would not have been traversable; and, consequently, that the plea raised an issue wholly immaterial.

The points stated by the defendant were, that the defendant was not bound by the contract alleged in the declaration to marry until after he had been requested so to do, and that no breach could accrue till request had been made; and that the declaration was bad, shewing no breach of the contract declared upon, no request being alleged, nor any averment that a reasonable time had elapsed before the commencement of the suit; that it was not a sufficient breach of the contract to say that the defendant, after the making of the promise, married another woman, though proof of that fact might, upon a declaration properly framed, be evidence of a dispensation of a condition on the part of the plaintiff to make a request.

Peacock (with whom was *Lush*) in support of the demurrer. The plea is bad for traversing a fact not alleged nor implied in the declaration. And the declaration is good, although it contains no averment of a request having been made. The case of *Harrison* v. *Cage and ux.* (*a*) is in point. There the promise as alleged in the declaration was generally to marry the plaintiff; and the breach, that though the plaintiff was ready and often offered to marry the defendant's wife, she had not married him, but married the defendant (*b*); and, on motion in arrest of judgment, it was held, that it was not necessary to state any time for the request, for it should be in convenient time; nor that it was with a parson: and one of the reasons given is, because "in this case it appears that the defendant has disabled herself by marriage from the performance of her promise." It will be argued, perhaps, that non constat, that at the

(*a*) 1 Ld. Raym. 386; S. C. 1 Salk. 24; 12 Mod. 214.
(*b*) See the report in 12 Mod. 214.

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time a request was made, the defendant might not be in a situation to marry, and that, therefore, no sufficient breach is disclosed; but the case of *Ford* v. *Tiley* (*a*) shews, that if a party contract to perform a certain act, the moment he puts it out of his power to fulfil his contract, he commits a breach; and the other party need not even shew that the time for the performance of the contract is arrived. Mr. Justice *Bayley*, in delivering the judgment of the Court in that case, says, "the authorities are, that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives. In 1 *Roll. Abr.* 248, pl. 1, (8 *Vin.* 225), it is said, 'if a day be limited to perform a condition, if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broken, as if the condition be to enfeoff one before Michaelmas; if, before the feast, he enfeoff another, though he after repurchases, yet he cannot perform the condition;' and he cites 21 Edw. 4, c. 55, where *Choke*, who was then one of the justices of C. B., so lays it down. The same may be collected from *Co. Litt.* 221, b., where, upon a feoffment on condition to re-enfeoff, on payment of a certain sum by the feoffor or his heirs before a certain day, a distinction is taken between a disability in the interim, on the part of the feoffor or his heirs, and a disability on the part of the feoffee; a removal of the disability before the day from the feoffor or his heirs, entitling them to require a re-infeoffment, and the removal from the feoffee being no saving to him of the consequences of a breach; and Lord *Coke* adopts *Littleton's* reason, 'maintenant by disability of the feoffee the condition is broken, and the feoffor may enter.'" The case of *Bowdell* v. *Parsons* (*b*), is also an authority to the

(*a*) 6 B. & C. 325; S. C. 9 D. & R. 448.
(*b*) 10 East, 359.

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same effect. There the declaration stated, that in consideration of the purchase of hay by the plaintiff of the defendant, the latter promised to deliver to and suffer the plaintiff to take it away as he wanted it, when requested; and it was held that an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of the residue to other persons, superseded the necessity of alleging a request to deliver the residue. It is true that the defendant was not bound to marry her before she made request. By marrying another, however, he has put it out of her power to make a request, and has dispensed with the necessity of her alleging a request in her declaration.

Butt, contrà. In *Harrison* v. *Cage and ux.* (*a*), there was a direct request alleged; and the marginal note, which is to be found in some editions, that "in an action on a promise to marry upon request, a declaration which shews that the defendant has married another person who is living, need not state a request," is incorrect. That case was decided on the objection that the request should have been alleged with a parson, and all that the Court really held was, that that was not necessary. The case of *Ford* v. *Tiley* (*b*), came before the Court on a motion to enter a nonsuit, and not on a point of pleading, as in the present instance. The passage from *Co. Litt.* p. 221, b., which has been cited, does not apply; for here the action is founded on a contract, a material term of which is, that a request should be made. It may be that the plaintiff may never make any request, then is the defendant for ever to remain unmarried? The cause of action accrues only from the time of the request; *Holmes* v. *Kerrison* (*c*); *Thorpe* v. *Booth* (*d*). There should have been an averment that the person whom the defendant married was still alive; *Fryer* v. *Coombs* (*e*); *Dayrell* v.

(*a*) 1 Ld. Raym. 386; S. C. 1 Salk. 24; 12 Mod. 214.
(*b*) 6 B. & C. 325; S. C. 9 D. & R. 448.
(*c*) 2 Taunt. 323.
(*d*) Ry. & Moo. 389.
(*e*) 11 A. & E. 403; S. C. 4 P. & D. 120, note (*a*).

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Hoare (*a*). [*Coleridge*, J.—There is a case of *Seymour* v. *Gartside* (*b*), where an omission to offer to marry seems to have been construed into a refusal to marry. There was no averment of request, but merely that though a reasonable time had elapsed, yet that the defendant did nor would marry the plaintiff. *Patteson*, J.—The marginal note to that case is incorrect. There was no promise to marry within a reasonable time *after request*. The promise is alleged to be to marry within a reasonable time then next following.] Here the promise is distinctly to marry "within a reasonable time next after the defendant should be thereunto requested." He sought also to distinguish *Bowdell* v. *Parsons* (*c*).

Peacock was heard in reply. He referred to 1 *Sugd. Vend. and Purch.* 373, 10th ed.

Lord DENMAN, C. J.—It appears to me that we must look at this case with a view to the feelings and intentions of the parties at the time when they enter into this contract. There can be no doubt that in such a contract each party expects to marry the other in the same state and condition as they then were. Now, if either party by his own act puts himself in a disability to perform the contract, I think he dispenses with the other party going through the useless form of requesting him to do that which it is no longer in his power to do; so far as to enable him to maintain an action for the breach of contract. It is not necessary to look at other cases to which an analogy is suggested; as the intention of the parties is here all important. It seems to me, therefore, that in such a contract as the present, either party imposing on himself or herself a disability to perform it, dispenses with any condition precedent to be performed by the other party. In marrying, therefore,

(*a*) 12 A. & E. 356; S. C. 4 P. & D. 114.

(*b*) 2 D. & R. 55.

(*c*) 10 East, 359.

I think the defendant committed such a breach as entitles the plaintiff to maintain his action without alleging a request.

PATTESON, J.—The only difficulty I have seen in the present case is in the precise form of the declaration. If the promise had been laid to marry generally, or upon request, or within a reasonable time, the case of *Harrison* v. *Cage and ux.* (*a*) would undoubtedly apply; for a party who has put it out of his power, for a time at least, to perform his contract, dispenses with all conditions precedent on the other side. On consideration, however, I do not see any difference between a promise to marry upon request, and a promise to marry within a reasonable time after request. The parties must be taken (as has been observed by Lord *Denman*) to have contracted with reference to the state and condition in which they then were. That state has been put an end to by the defendant; and, therefore, I think the plea is bad, for alleging a non compliance with a condition precedent which the conduct of the defendant rendered it unnecessary for the plaintiff to perform. For the same reason the declaration is good, without any request being alleged by the plaintiff to marry her. Nor need the declaration state that the defendant's wife was alive at the time of bringing the action, as there is a sufficient breach disclosed by the defendant's marrying another person.

COLERIDGE, J.—The meaning of the promise as alleged in the declaration, is to marry within a reasonable time after a request, that request being made within a reasonable time. Nothing appears on the pleadings to shew that more than a reasonable time had elapsed before the defendant's marriage. Then if at any time he disable himself from

(*a*) 1 Ld. Raym. 386; S. C. 1 Salk. 24; 12 Mod. 214.

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fulfilling his contract by marrying another person, it becomes unnecessary at that time to make the request. At that time the contract is broken, and the contract being broken, it becomes immaterial whether the defendant's wife be still alive, for the plaintiff has a right to bring his action to recover damages for the breach of it.

WIGHTMAN, J., concurred.

COURT OF COMMON PLEAS.

Hilary Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

1 C. 2 C. B. 548

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A declaration stated, that before the making the promise hereinafter mentioned, the plaintiff had brought an action in the Exchequer against the defendant to recover a certain sum of money: that issues in fact had been joined between the parties, and notice of trial given; that in consideration that the plaintiff would forbear further proceedings until the 14th of December, the defendant promised to pay the money and costs upon that day; and that in the event of his not paying, a Judge's order should be drawn up to secure payment. There was also a count on an account stated. Pleas: first, to the first count, that the plaintiff never had any cause of action in the action in the Exchequer, which he well knew. Second, to both counts, that the original action was brought on two cheques, and that the Judge's order was made upon certain terms, (setting them forth) that the promise in the first count mentioned was deduced from that order, and that the promise in the second count was deduced from the order ascertaining the amount of costs due on taxation, and that the order was afterwards set aside: *Held*, upon general demurrer, that the former plea was good, and, on special demurrer, that the second plea was bad, as amounting to the general issue.

Query, if it had been objected on special demurrer, that the former plea did not shew the defendant to be in a condition successfully to defend the action in the Exchequer, would the plea have been good?

ASSUMPSIT. The declaration stated, that before the making of the promise hereinafter mentioned, the plaintiff had commenced an action on promises in the Exchequer against the defendant, in which the plaintiff had declared for the non-performance by the defendant of certain promises in the said declaration alleged to have been made by the defendant to the plaintiff, for the payment to him of two sums, one amounting to 1,300*l.*, and the other to 700*l.*, and the said action was so commenced and prosecuted, and the plaintiff declared therein as aforesaid, for the recovery of those sums, and the damages by him sustained by the non-performance by the defendant of his promises in

(*a*) See this case, *ante*, p. 27; S. C. 1 C. B. 610.

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respect of the same, parcel of such damages, being interest upon the said sum of 1,300*l.* from the 25th of May, 1840, and another parcel of those damages, being interest upon the said sum of 700*l.* from the 4th of July, 1840, to which action the defendant had pleaded various pleas, on which issues in fact had been joined, and the same were about to be tried, and the nisi prius record entered for trial, at the sittings in Middlesex, after Michaelmas Term, 1844, and the same would have been tried on the 7th of December, 1844, which had been appointed for the trial, and that the plaintiff had incurred costs and charges in preparing for trial; that the plaintiff had also been served with a notice by the defendant on the 3rd of December, 1844, that the defendant would apply to the Court of Chancery for an injunction to restrain the plaintiff from issuing execution in the said action, in case the plaintiff should obtain judgment; and thereupon, to wit, on the 6th of December, 1844, being the day next before the day when the said trial was appointed and fixed to take place, in consideration that the plaintiff, at the request of the defendant, would forbear proceeding, and stay all further proceedings in the said action, until and upon the 14th of December, 1844, save and except the taxation of the said costs and charges, and the obtaining and drawing up an order therein, as hereinafter mentioned; the defendant then promised the plaintiff that he, the defendant would, on that day, pay him the said sums of 1,300*l.* and 700*l.*, and interest thereon respectively as aforesaid, together with the said costs and charges, to be taxed; and that in the event of the defendant's not paying the same, the defendant would suffer, and the plaintiff should be at liberty to sign a judgment in the said action, and that a Judge's order should and might be obtained and drawn up in the said action to secure such payment; and that the said notice, and the said application and motion to the said Court of Chancery, should be abandoned. The declaration then averred, that confiding in the defendant's promise, the plaintiff withdrew the

record, and forbore prosecuting, and stayed all proceedings in the action, until the 14th of December, save and except the taxation of costs, and obtaining and drawing up the said order, and had still forborne to prosecute, and had stayed all proceedings in the said action; that the costs were taxed on the 11th of December, yet the defendant had not paid the principal sums, or interest, or the costs, and the defendant afterwards procured the Judge's order, drawn up in pursuance of the agreement, to be set aside. There was also a count on an account stated.

To the first count of this declaration, the defendant pleaded, fourthly, that the plaintiff never had any cause of action against the defendant, in respect of the subject-matter of the action in the Court of Exchequer, in that count mentioned, which he, the plaintiff, at the time of the commencement of the said action, and thence until and at the time of the making of the promise in the said first count mentioned, well knew. Verification.

Demurrer, on the ground that it did not confess and avoid, or traverse or deny any of the matters in the first count mentioned; that it set up as a defence immaterial matters; that it did not allege or shew that the defendant, before or at the time of the making of the said promise, was not aware that the plaintiff had no cause for the said action, nor did it allege or shew that the plaintiff concealed anything from the defendant; that it was ambiguous and uncertain what was meant by the allegation in his plea, that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action; that the plea did not exclude all other consideration for the said promise, and that it was ambiguous and uncertain from the said plea, what was the real defence the defendant intended setting up thereby; and that it should have concluded to the country. Joinder.

Seventhly, to the whole declaration, the defendant pleaded that the said action in the said first count mentioned was brought in respect of two cheques, one for 1,300*l.* and the

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other for 700*l.*, and that after the nisi prius record in the said count mentioned had been entered, to wit, on the day aforesaid, the defendant, with the consent of the plaintiff, obtained an order in the said cause in the said count mentioned to be, and the same was made by the Honourable Sir *Edward Hall Alderson*, Knight, one of the Barons of the said Court of Exchequer, and which order was as follows, that is to say, "Wade *v.* Simeon. Upon hearing the attorneys or agents on both sides, and by consent, I do order, that upon payment of 2000*l.* and interest on the two cheques from the date thereof until payment, the debt due from the defendant to the plaintiff, for which this action is brought, together with costs, to be taxed and paid on or before the 14th day of December instant, all further proceedings in this cause be stayed; and I further order, that in case default be made in payment as aforesaid, the plaintiff shall be at liberty to sign final judgment and issue execution for the whole amount remaining unpaid at the time of such default, with costs of judgment and execution, sheriff's poundage, officers' fees, and all other incidental expenses, whether by fieri facias or capias ad satisfaciendum. Dated the 6th day of December, 1844, *E. H. Alderson.*" And the defendant further says, that the promise in the said first count mentioned that the defendant would, on the said 14th day of December, pay the plaintiff the said sums of 1,300*l.* and 700*l.*, and interest thereon respectively as aforesaid, together with the said costs and charges, such costs and charges to be taxed; and that in the event of the defendant not paying the same, the defendant would suffer, and the plaintiff should be at liberty to sign judgment in the said action, was a promise deduced and implied from the obtaining and the making of the said order as aforesaid, and was thereby and in no otherwise made to the plaintiff as in the said count alleged. And the defendant further says, that the promise in the said second count mentioned was a promise deduced and implied from the obtaining and making of the said order hereinbefore mentioned, and from

the ascertaining by taxation of the amount of the costs to be paid pursuant to the said order, and was thereby and in no otherwise made to the plaintiff as in the second count alleged. The plea then stated that the order had subsequently been set aside by a rule of the Court of Exchequer.

Demurrer also to this plea, on the ground that it amounted to the general issue, and was no answer to the count on the account stated. Joinder.

Channell, Serjt., in support of the demurrers. As to the demurrer to the fourth plea. The abandonment or compromise of a doubtful claim was a good consideration for a promise. Here, however, it would be contended in support of the plea, that as it alleged the plaintiff to know that he had no cause of action when the compromise was made, it could not be considered as a doubtful claim, and, consequently, that there was no consideration for the alleged promise. It was not, however, alleged in the plea that the defendant was aware of such a defective claim on the part of the plaintiff, or that the defendant was in a situation to avail himself of the defect. It was possible that the plaintiff might have a primâ facie claim upon the defendant, but which the defendant could not answer, either from ignorance of facts, or not being in a situation to prove his defence. Thus it might be that the plaintiff was the holder of a bill of exchange, purporting to be drawn abroad, and requiring no stamp, but actually drawn in England. There the plaintiff would not have an available cause of action, and might know it, yet the defendant, from ignorance of the place wherein the bill was actually drawn, might be unable to render his defence available. There would be nothing immoral in the plaintiff proceeding with his action in such a case, taking the chance of the defendant not successfully resisting the proceeding. Foregoing such a chance would constitute a sufficient consideration for a promise. [*Tindal*, C. J.—If the defendant were unable to prove his defence, should not that have been replied. The case in

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1 *Roll. Abr.* p. 26 (*a*), seems to be analogous to the present.] It was held in *Longridge* v. *Dorville* (*b*), that the plaintiff having given up a suit instituted to try a question as to which the law was doubtful, was a good consideration for a promise to pay a certain sum. The decisions on the question, which was as to the liability of the owners for injuries done while the ship was under the control of the pilot required by law, were contradictory. There, the Court treated it as clear, that giving up a doubtful question of fact would also be a good consideration. Mr. Justice *Holroyd* there observed, that the "defendant might derive a benefit, by having that suit put an end to, without further trouble or investigation." It might happen that the plaintiff was a pauper, and then whatever expense he incurred in defending the action would not be re-imbursed. To relieve himself from such a consequence would be an advantage to him, and would therefore form a good consideration. The plea, therefore, was bad, as not excluding all considerations which might support the promise. It was also bad as amounting to the general issue, as it argumentatively denied the promise alleged. This however, had not been pointed out as a ground of special demurrer. Then with respect to the seventh plea, the defendant was in this difficulty, that if the promise alleged in the first part of the declaration were different from that to be deduced from the Judge's order, the plea was no answer to the declaration; if it were the same, then the plea amounted to the general issue. If the order were set aside, it was in fact the same as if it had never existed. Moreover it was pleaded to the whole declaration, and certainly could not be an answer to the count on the account stated.

Kinglake, Serjt., (*Barstow* with him) in support of the pleas. The defendant's fourth plea was good. The forbearance of an unfounded action could, in contemplation

(*a*) *Lane* v. *Mullory*. (*b*) 5 B. & A. 117.

of law, form no consideration for a promise. It might be that a convenience would accrue to the defendant that he should not be made party in an action, but that did not constitute a benefit which the law could recognise as the consideration for a promise. In *Com. Dig.* tit. "*Action upon the case upon Assumpsit*," (B 1), in speaking of consideration of forbearance that defendant should account with the executor, it is said, "but if there be no debt or assets, it shall be given in evidence." In *Loyd* v. *Lee* (*a*), it was held that forbearance was no consideration where there was originally no cause of action. That was the case of an action on a promissory note given by a married woman, and Chief Justice *Pratt* there observed, that the note was not barely voidable, but absolutely void. Here, as the demurrer admitted the facts stated in the plea, the plaintiff appeared knowingly to have brought an unfounded action. So also in *Atkinson* v. *Settree* (*b*), it was held that a release from an illegal arrest was not a good consideration for a promise to pay the debt. Again, in *Jones* v. *Ashburnham* (*c*), a declaration was held bad where it alleged a promise to pay in consideration of forbearance to sue, it not shewing that there was any person whom the plaintiff could have sued for his debt. Lord *Ellenborough* there observed, in the course of the argument, "it is not entitled to the name of forbearance unless you shew something or somebody to be forborne. If there be a right which can be enforced against any body, no doubt that a promise to forbear is a good consideration: but if there be no person liable, how is it entitled to the name or quality of forbearance." It could not be considered as constituting any benefit to the defendant, that he was relieved from the chance of an improper result, or from the inconvenience of incurring expense in the course of the inquiry. The law would presume that justice would be

(*a*) 1 Stra. 94.
(*b*) Willes, 482.
(*c*) 4 East, 455; S. C. 1 Smith, 188.

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done between the parties, and that an adequate compensation would be made to the defendant for the inconvenience incurred by the costs paid by the plaintiff. In *Longridge* v. *Dorville* (*a*), the question raised in the suit compromised was exceedingly doubtful, and therefore giving up a claim depending on so doubtful an inquiry, might well be considered as a good consideration. [*Maule*, J.—*Jones* v. *Randall* (*b*) was the first case in which the Courts appear to have recognised the proposition that there might be such a thing as a doubtful question of law.] *Edwards* v. *Baugh* (*c*) was in support of the view contended for. There, a declaration was held bad, as there was no averment that the debt in respect of which the plaintiff forbore to sue was due to the former from the defendant. It merely alleged that "certain disputes and controversies were pending between the plaintiff and defendant, as to whether or not the defendant was indebted to the plaintiff in, to wit, the sum of 173*l.* 2*s.* 3*d.*" So also in *Herring* v. *Dorell* (*d*), where a plaintiff discharged one of two joint debtors, and afterwards arrested the other, the Court held a promise by a third person to pay the debt, in order to obtain the discharge of the defendant who had been arrested, was void, for want of consideration. No doubt in *Smith* v. *Monteith* (*e*), the Court held the declaration there good on general demurrer, as it must be presumed that the compromised action was well founded, there being no allegation in the plea to shew that there was no cause of action; but here the plea expressly alleged that there was no cause of action, and that the plaintiff was aware of it. If the plea could be considered as defective, on the ground that it amounted to the general issue, that objection was not available, as it was not pointed out in the demurrer. Then as to the seventh plea, that did not amount to the

(*a*) 5 B. & A. 117.
(*b*) 1 Cowp. 37; S. C. Lofft. 384.
(*c*) 11 M. & W. 641; S. C. *ante*, vol. 1, p. 304.
(*d*) 8 Dowl. 604.
(*e*) 13 M. & W. 427; S. C. *ante*, vol. 2, p. 358.

general issue, because it in effect confessed an agreement by means of the Judge's order, to which the defendant consented, and then avoided that agreement, by shewing its subsequent rescision. [*Maule*, J.—The declaration is framed upon an agreement alleged to have been made between the parties prior to the making of the Judge's order. Under the plea of non assumpsit, the defendant would be permitted to shew, if he could, that no such agreement existed, but only one to consent to the Judge's order being made. The plea, therefore, amounts to the general issue. *Tindal*, C. J.—The plea alleges that no promise was made by the defendant, except that which could be deduced from the Judge's order. It then proceeds to shew that no such promise could be deduced. I therefore think the plea amounts to the general issue.]

Channell, Serjt., in reply. As to the fourth plea, there is a distinction between a forbearance to proceed with a suit already commenced, and a forbearance to sue at all. In the present case, the suit is alleged to have been actually existing at the time when the promise was given. The authorities, therefore, from *Com. Dig.* and *Jones* v. *Ashburnham* (*a*), and *Edwards* v. *Baugh*, were not opposed to the plaintiff's view. In the last case, Lord *Abinger* said, "where an action is depending, the forbearance to prosecute it is a sufficient consideration for a promise to pay a certain sum of money; for, besides other advantages, the party promising would save the extra costs which he would have to pay, even if he were successful." It is consistent with the plea in the present case, that the defendant did not by his plea in the original action put himself in a position to render his defence available. [*Cresswell*, J.—Are we to assume upon this record that the defendant had placed himself in a wrong position by his mode of pleading.] The plea here was as defective as that in *Smith* v. *Monteith*.

(*a*) 4 East, 455; S. C. 1 Smith, 188.

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[*Maule*, J.—If the plaintiff's demurrer had stated it as a ground that the plea was bad, because it did not allege the defendant to have any available defence to the action, that might have been a valid objection. But the words "that the plaintiff never had any cause of action against the defendant" may be taken to mean that the defendant had an available defence to the action, and therefore they must be so construed upon general demurrer.] But the plea was still ambiguous, and one of the grounds of demurrer was ambiguity.

TINDAL, C. J.—The question in this case now turns upon the fourth plea; and the point to be decided is, whether upon general demurrer that plea is good, and I think that it is. The declaration states that an action had been commenced by the plaintiff against the defendant, and that during its pendency, in consideration that the plaintiff would forbear proceeding, the defendant promised to pay him the sums of money for which the action was brought, and the costs; that the plaintiff did forbear: yet the defendant did not pay the said sums. To this the defendant has pleaded, by his fourth plea, that the plaintiff never had any cause of action against the defendant, and that he knew it. The plaintiff has demurred generally to this plea: he admits, therefore, the facts which it alleges to be true; and, having admitted that he had no cause of action in the original suit, I think the plaintiff is estopped from saying that there was a good consideration for this promise. It is contra bonos mores and against law, that where a man knows that he has no cause of action, he should still persevere in prosecuting it. But, to view the case on more technical grounds, a consideration, to be good, must be for something either for the benefit of the defendant, or to the detriment of the plaintiff. Was the forbearance of the original suit for the benefit of the defendant? We must presume, that had the action proceeded, the defendant would have obtained judgment, and

then the costs to which he would then have been entitled must be taken to be, by law, a sufficient compensation to him for all that he had sustained. Then, was it to the detriment of the plaintiff? Clearly not, for its forbearance saved the payment of both the defendant's and his own costs. It has been urged by my Brother *Channell*, that there is a difference between the present case and the old authorities which have been cited, as this declaration alleges that an action had been already commenced; whereas, in those cases, it did not appear that any action had been brought. In the first place, I am not able to perceive any real or substantial difference raised by this distinction; but, in the second place, the cases cited do not admit of any such distinction. In the case of *Tooley* v. *Windham* (*a*), it evidently appears that the suit was in existence at the time the promise was made. So in *Atkinson* v. *Settree* (*b*) it must have been so, for it is alleged that the defendant was arrested. The cases cited, therefore, establish the principle which should guide the decision of this Court in favour of the defendant; nor do I think that the case of *Longridge* v. *Dorville* (*c*) at all impeaches it. The circumstances of that case were peculiar; and it may well be, that when the ship had been taken possession of, and the event of the suit was doubtful, that a promise made in consideration of the defendant's obtaining speedy possession of the ship should be held to be founded upon a good consideration. But here, the legal event was certain, for the plaintiff admits that he never had any cause of action in the original suit. For these reasons, I am of opinion that the defendant is entitled to the judgment of the Court.

MAULE, J.—I am of the same opinion. Although it may still be an open question whether, if the objections had been properly taken on the grounds of special demurrer,

(*a*) Cro. Eliz. 206.
(*b*) Willes, 482.
(*c*) 5 B. & A. 117.

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the fourth plea is good in form, still I agree with my Lord Chief Justice, that the forbearance of a suit by the plaintiff to the defendant in respect of a cause of action known by the plaintiff to be unfounded, and in which therefore he must eventually fail, forms no valid consideration for a promise by the defendant. It is no detriment to the plaintiff, because he must eventually have failed; neither is it any benefit to the defendant, because he would have recovered costs, which are intended by the law to repair any inconvenience he may have been put to. In the case of *Smith* v. *Monteith* (*a*), it appears to have been considered, that a statement in the plea that the plaintiff there had not any claim or demand, or cause of action against the original defendant, in respect whereof the plaintiff could or was entitled to recover in that action the sum the defendant promised to pay, was insufficient, as negativing consideration; and, in the same way, it may be taken as doubtful, whether the plea in the present case, by simply alleging that the plaintiff never had any cause of action, and was aware of it, does sufficiently shew that the plaintiff must necessarily have failed had he continued the action. But that ground of special demurrer has not been taken; and, upon general demurrer, I think we must intend this plea to mean, that the plaintiff in the original action must necessarily have failed, and the defendant must necessarily have succeeded. It is argued by my Brother *Channell*, that the grounds of special demurrer do sufficiently point at this objection, when they say that the plea is bad for ambiguity. But I do not think that that is sufficient; the objection is not thereby specially assigned and set forth within the meaning of the statute. But this, I confess, is a matter of some doubt, and I should not be surprised if the Exchequer Chamber should be of a different opinion.

CRESSWELL, J.—I am of the same opinion. The decla-

(*a*) 13 M. & W. 427; S. C. *ante*, vol. 2, p. 358.

ration is framed upon a promise to pay a sum of money, in consideration that an action already commenced should be forborne from being further prosecuted. The plea is, that there never was any cause of action, and that the plaintiff knew it. In the older cases, no distinction such as my Brother *Channell* attempted to raise is to be found; and indeed, Lord *Coke* lays down the rule generally to be, that the staying of an action which has been brought unjustly, forms no consideration for a promise. Then does it sufficiently appear by this plea, that the plaintiff had commenced an action in which he must necessarily have failed, and the defendant have necessarily succeeded? I think it does. The plea states that the plaintiff never had any cause of action, and I do not see why we should intend that the defendant had put himself into such a position by a slip in pleading, that he was unable to avail himself of his rightful defence. At any rate, on general demurrer, I think the plea is good.

ERLE, J.—The declaration in this case states, that in the original action between these parties, pleas had been pleaded by the defendant, and issues in fact had been joined. Now the defendant, by his plea in the present action, says, that the plaintiff had never had any cause of action against the defendant in respect of the subject-matter of the action in the Court of Exchequer in that count mentioned, which he, the plaintiff, well knew. The meaning of those words I consider to be, that upon the issues as they stood, the defendant must succeed, and the plaintiff fail. I think, therefore, that the plea is good.

Judgment for the defendant on the fourth plea; for the plaintiff on the seventh plea.

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It is not necessary that an attorney's bill should be entitled in a cause or Court, if from the bill taken altogether, it can be reasonably ascertained in what Court and cause the business has been transacted.

4. DTL. 63. 6 — " — 694

DEBT for work and labour as a solicitor. The defendant, besides other pleas, pleaded, first, the Statute of Limitations; and, secondly, that no signed bill pursuant to the statute had been delivered. At the trial before *Maule*, J., at the last Northampton Summer Assizes, it was objected that the bill delivered by the plaintiff did not sufficiently comply with the provisions of the 2 Geo. 2, c. 23, s. 23, as it did not state the Court or cause in which the business had been done. *Maule*, J., was of opinion that the bill did sufficiently comply with the provisions of the statute in that respect, and therefore directed a verdict to be entered for the plaintiff for 634*l*. Another objection was, that a portion of the business done, which was all in one cause, had been transacted more than six years before the action was brought. On this point, also, *Maule*, J., was of opinion in favour of the plaintiff. Leave was then given to move to enter a verdict for the defendant, if the Court should be of opinion that the first objection was sustainable; or to reduce the verdict by the amount of such items as had accrued more than six years previous to bringing the action, if the Court thought that the second objection was sustainable. A rule was granted upon both points in the following Term, and cause was now shewn against it by

Channell, Serjt., (*Hayes* with him.) The items to which attention need be directed were the following:

" Mrs. and the Miss Falkners.

" To Benjamin Martindale.

1835.		£	s.	d.
Dec. 22.	Attending on you, conferring and advising respecting your suits in Chancery, and as to the order for dismissal, &c., when you left me the papers to peruse, and promised to call to-morrow -	0	6	8

		£	s.	d.
Dec. 23.	Attending on you, conferring and advising further on your affairs, and explaining to you the mode in which I thought you might be reinstated in your proceedings before the Court, when it was decided that you should bring me a retainer, &c., on Saturday next - - -		0	6 8
24.	Perusing decrees and reports at the Report Office, &c. - - - - -		1	7 6
29.	Attending on Mr. Ridgway this morning, discussing four suits, and the best mode of proceeding with him - - - - -		0	6 8
	(Here followed various other items.)			
1836.				
Jan. 22.	Attending at the Six Clerks' Office, searching for record, and paid - - -		0	9 8
Mar. 16.	Attending on you, very long conference respecting your wish to raise money, explaining to you the nature of the decree I had obtained, &c.		0	13 4
	&c. &c. &c.			
	Hilary Term, 1836.			
	Falkner *v.* Matthews.			
	Paid for minutes of decree - - -		0	5 0
Feb. 8.	Attending registrar to settle minutes, but he declined, in consequence of the insertion that rests were to be taken as a matter of course, was not so authorized by the Court - -		0	13 4
18.	Copy minutes, as wished to be settled for the Lord Chancellor - - - -		0	3 0
20.	Attending Court, cause in paper, and ordered to stand over - - - -		0	13 4
	&c. &c. &c.			
27.	Instructions for interrogatories - -		0	10 4
	&c. &c. &c.			
	Easter Term.			
	Paid clerk in Court - - -		0	6 8
	(Various items were then continued through the different consecutive Terms, and relative to the same business.)			
	Hilary Term, 1840.			
Jan. 21.	Attending plaintiff, explaining to her the nature of the Master's report - - -		0	13 4
	Instructions for exceptions to the Master's report		0	13 4
	Copy of exceptions for the Master of the Rolls		0	6 8
	Copy decree for the Master of the Rolls		0	2 6
	Copy report for his Lordship - -		0	13 4
	&c. &c. &c.			

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		£	s.	d.
	Michaelmas Term, 1840.			
	Attending Mr. Bull, explaining to him the situation the parties were placed in by the decision of the Master of the Rolls - - -	0	6	8
	&c. &c. &c.			
	Copy order on further directions for the Master of the Rolls - - - -	0	3	0
	&c. &c. &c.			
Mar. 15.	Attending Court - - - -			
19.	Paid short handwriter for copy of judgment	2	5	0

This is my bill, &c.

July 5, 1843.

"B. MARTINDALE."

It was objected, on the part of the defendant, that these items did not sufficiently disclose the name of the Court and the cause in which the business in respect of which the plaintiff brought his action, had been done. The statute of 3 Jac. 1, c. 7, would not sustain the objection as had been decided in the case of *Lester* v. *Lazarus* (*a*). If available at all, it must be under the 2 Geo. 2, c. 23, s. 23. By that statute, it would be observed, however, that no express provision was made requiring such a bill to be delivered; but it was to be implied, from the provision which enabled the client to apply to have his attorney's bill taxed, that such a bill should be furnished. The words of the section were, that "upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized unto the said Lord High Chancellor, or the Master of the Rolls, or unto any of the Courts aforesaid, or unto a Judge or Baron of any of the said Courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted," "it shall and may be lawful for the said Lord High Chancellor, the said Master of the Rolls, or for any of the Courts aforesaid, or for any Judge or Baron of any of the said Courts respectively, and they

(*a*) 2 Cr., M. & R. 665; S. C. 4 Dowl. 397.

are hereby required to refer the said bill, and the said attorneys or solicitors' demand thereupon, although no action or suit shall be then depending in such Court touching the same, to be taxed and settled by the proper officer of such Court." No doubt it had been considered proper that the bill should disclose to the client the name of the Court in which the business had been done, in order to enable him to proceed to taxation. *Parke*, B., in *Lester* v. *Lazarus*, had expressed an obiter opinion to that effect, but he had not stated that he was of opinion that the bill should be headed either in the Court or the cause. The question now before the Court had been brought before the Court of Queen's Bench in *Lane* v. *Glenny* (*a*), but the Court declined expressing any opinion upon it, the decision proceeding on the admissibility of the objection under the defendant's plea. In *Lewis* v. *Primrose* (*b*), however, it was expressly decided, that under the 2 Geo. 2, c. 23, s. 23, an attorney's bill for work and disbursements in a suit must specify the Court in which the suit was. There, however, the report stated, that the bill did not mention in what Court the action was. Here, however, the bill stated the name of the Court, and the cause in which the business had been transacted. No express direction was given by the statute, nor was any suggested in *Lewis* v. *Primrose* as to the precise form in which the information should be given. All, therefore, that could be necessary was, that the client should be informed by the bill in what Court and cause the business had been done. The bill in the present case, if the different items in it were considered, disclosed to any ordinary person's mind that the business done and in respect of which the claim was made, had been transacted in the Court of Chancery, and before the Master of the Rolls. [*Maule*, J.—In order that a person may know in what branch of the Court the business was done, it is necessary that a person should be acquainted with

(*a*) 7 A. & E. 83; S. C. 2 N. & P. 258. (*b*) 6 Q. B. 265.

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Chancery practice; for the Chancellor sits in bankruptcy, lunacy, and the House of Lords. The question to be determined for the client is, who is to make the order for taxation?] Then with respect to the second objection, that a portion of the bill was in respect of the business done more than six years before the action was brought, that could not be sustained. The business here was all transacted in one cause, and it was decided in *Harris* v. *Osbourn* (*a*), that as the employment of the attorney for the suit is one entire contract, the statute only begins to run in such case from the conclusion of the suit (*b*). Here the suit did not conclude till within six years before the commencement of the action.

Dowling, Serjt., (*Miller* with him), supported the rule. The opinion of *Parke*, B., in *Lester* v. *Lazarus* (*c*), as to the necessity for stating the Court wherein the business was transacted, was confirmed by the case of *Lewis* v. *Primrose* (*d*). There Lord *Denman* observed, "this objection must prevail, or the statute be in effect repealed. The very object of the enactment is, that the client, if he likes, may take the bill to another attorney for his advice upon it. Why is the client to be forced to ask questions? And how can we say that he is told in respect of what business the charge is made, when he is not told where the business was done?" So also *Patteson*, J. "The argument from the power which the Court has to order taxation appears to me very strong. For how inconvenient it would be if a Judge, in order to ascertain whether he has jurisdiction, had to receive evidence shewing where the business had been done. The rule imposes no hardship on the plaintiff: and I think it much the best to hold that a bill, to be correct, must specify the Court and the cause." The clear intention of the Legislature was to enable unlearned persons to know

(*a*) 2 Cr. & M. 629.
(*b*) See 11 M. & W. 106; S. C. 2 Dowl. 1031, N. S.
(*c*) 2 Cr., M. & R. 665; S. C. 4 Dowl. 397.
(*d*) 6 Q. B. 265.

in what Court they ought to apply to have their attorney's bills taxed. The client might be a female, as in the present case, or might retain his attorney, and then go abroad, without any knowledge whatever as to the Court in which the proceeding took place; and here the items in the plaintiff's bill convey no such information. The client is in fact left to guess where the business has been transacted, instead of finding it distinctly and unequivocally stated where the whole of the business, and not merely some portion of it, was done. As to the second objection, founded on the Statute of Limitations, the cases cited on the other side did not apply, as no evidence was given at the trial for the purpose of shewing that the items in the bill were in respect of one continuous suit.

TINDAL, C. J.—The cases cited in the course of the argument on behalf of the plaintiff, are a sufficient answer to the objection founded on the Statute of Limitations. Then with respect to the other objection, that it should appear by the bill of costs in what Court the business was transacted, and also what are the names of the parties to the suit. Upon this point I agree entirely with the judgment pronounced by the Court of Queen's Bench in the case of *Lewis* v. *Primrose*. That decision, however, proceeded on the ground that neither in the heading of the bill, nor in any part of it, did the title of the cause or the names of the parties appear. We have not the bill in that case before us, but it must be assumed to have been one in which, by fair intendment, neither of those two requisites could be found. Now, looking at the present bill, and the different charges and items of which it consists, I think it does sufficiently appear that the business to which it relates was done in the Court of Chancery. The first charge is, "attending on you, conferring and advising respecting your suits in Chancery, and as to the order for dismissal," &c.; then, two days afterwards, "perusing decrees and reports at the Report Office;" and, so you go on, finding charges only referable to proceedings in equity,

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and inapplicable to those in the Common Law Courts. In the next page there is a charge for "attending at the Six Clerks' Office;" and then, after a heading of "Hilary Term, 1836," is the name of a cause, "*Falkner v. Matthews*;" and opposite is a charge, "paid for minutes of decree." Then there follows a continuous series of items, one of which is, "copy minutes as wished to be settled for the Lord Chancellor." Then still further on, "copy of exceptions for the Master of the Rolls," &c.; and no one charge do we find at all relating to any proceedings in a Court of Common Law. For these reasons, I cannot help inferring, from the contents of this bill, that it was for business done in a suit in Chancery, and that the name of the suit was *Falkner* v. *Matthews*. Then, if that be so, this case does not fall within the decision in *Lewis* v. *Primrose* (*a*); and the learned Judge was right at the trial in ruling that this bill sufficiently complied with the provisions of the statute 2 Geo. 2, c. 23.

MAULE, J.—This question arises upon a plea denying the delivery of a signed bill in accordance with the statutory enactments. At the trial, I was of opinion that a sufficient bill had been delivered; and I directed the jury to find for the plaintiff, reserving leave to the defendants to set aside that verdict, and enter one for themselves upon that issue. My Lord Chief Justice has pronounced his opinion that I was right in so holding, and I believe that my learned Brethren are of the same opinion. I however think that I was not right; but that the proper decision to have come to was, that this bill was insufficient. The act of the 2 Geo. 2, c. 23, by the very terms employed in the 23rd section, shews that its provisions were for the use of simple people, and not for any one having a competent knowledge of proceedings in Courts of law or equity. The object for which a bill was to be delivered, drawn with this plainness and particularity, was, that "upon application

(*a*) 6 Q. B. 265.

of the party or parties chargeable by such bill, or of any other person in that behalf authorized, unto the said Lord High Chancellor, or the Master of the Rolls, or unto any of the Courts aforesaid, or unto a Judge or Baron of any of the said Courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted; and upon the submission of the said party or parties, or such other person authorized as aforesaid, to pay the whole sum that upon taxation of the said bill shall appear to be due to the said attorney," &c., "it shall and may be lawful for the said Lord High Chancellor, the said Master of the Rolls, or for any of the Courts aforesaid, or for any Judge or Baron of any of the said Courts respectively, and they are hereby required to refer the said bill, and the said attorney's or solicitor's demand thereupon, although no action or suit shall be then depending in such Court touching the same, to be taxed and settled by the proper officer of such Court," &c. The object, therefore, of these provisions was, that a party might easily and conveniently get his attorney's bill taxed. The purpose would be defeated, unless he was informed in what Court the business was done; for, unless he was, he would not know where to go to obtain the order for taxation. Hence, the Court of Queen's Bench held, in *Lewis* v. *Primrose*, that a bill not mentioning the name of the cause or Court was insufficient; and I think that that case is substantially in point here. In that case certainly the name of the cause was not mentioned, but that omission is but a very slight inconvenience, in comparison with omitting the name of the Court in which the business is transacted. I do not think, however, that any of us would say that a bill, from which it could not, by any means, be collected what the name of the Court was where the business was done, would be sufficient; but the question upon which we now differ is, whether or not it does, by this bill, sufficiently appear what was the name of the Court. The question of what degree

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of certainty is required, is nearly connected with that very general one of how far every person in this country is presumed to have a knowledge of the law. In the present bill there is mention made of a warrant, of a decree of the Master of the Rolls, and the name of the Lord Chancellor is twice used. Now, I believe that there is no such presumption at all in this country, that everybody knows the law. Such a doctrine is contrary to common sense; and, at any rate, to one set of men, namely, the Judges of the land, it is inapplicable; for the common form by which a judgment of one of the superior Courts is reversed by the Court of Exchequer Chamber is this: "it appears to the said Court of our said Lady the Queen now here, that there is manifest error in the record and proceedings aforesaid, and in giving the judgment aforesaid." So in *Jones* v. *Randall* (*a*), Lord *Mansfield* treated as a future event, equally uncertain to the parties, whether the judgment of the Lord Chancellor would be confirmed or reversed by the House of Lords. He observed, "as to the certainty of the law mentioned by Mr. *Dunning*, it would be very hard upon the profession if the law was so certain, that every body knew it." The rule is simply this: that ignorance of the law shall not excuse; that is the real maxim. A person, therefore, of merely ordinary intelligence, ought not to be taken to know what the practice of the different Courts is: we are all aware, my own internal consciousness tells me, that the terra incognita is a very wide region indeed. That being so, the question is, whether the contents of this bill would shew to a person practically ignorant of the law, where the business was in fact transacted? Some propositions of law most persons understand; few educated persons in England are unaware that the eldest son is the heir to his father's real estate; but I do not think we can say that ladies are to be presumed to know from what Courts spring warrants, orders, and such like things.

(*a*) 1 Cowp. 37.

Now, taking for granted that ladies are ignorant of these matters, do the particular items of this bill shew, with sufficient certainty, in what Court and in what cause the business was done? One item, which has been observed upon is, that of "perusing decrees and reports at the Report Office:" these, it is said, must have been decrees and reports in Chancery. "Miss Hannah Falkner, there has been a decree made; tell me in what Court?" The answer of that lady to such a question would be, "it is a riddle that I cannot solve." How is such a person to know whether there is such an office as the Six Clerks' Office? At this present moment I do not know whether there is such an office in existence or not; but Miss Falkner, it seems, is to be taken to know it. I believe there are decrees made by the Court of Admiralty; and I am quite sure that there are several items in this bill with respect to which it is impossible for any one to know whether they are in a Court where they are taxable or not. There is a charge for attending the registrar; now, I believe there is a registrar of the Court of Admiralty. Another item refers to the Lord Chancellor, but, non constat, that that was not in a matter arising out of a cause in the Common Pleas, and that this was an intended application to the Court of Chancery for an injunction. In another place there are, "instructions for interrogatories;" but these often are drawn, in a common-law cause, for the purpose of examining witnesses who are abroad. So with respect to the items which refer to the Master of the Rolls, they do not by any means shew with sufficient certainty that there were any proceedings before him at all. I have now gone through most of the items which have been relied upon as pointing out the name of the Court in which this business was transacted, and I think I have done enough to shew that the defendants were entitled to a verdict; at the same time I am not sorry that the result of the majority of the Bench being of a contrary opinion will be, that substantial justice will be done.

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CRESSWELL, J.—I am of opinion that the ruling of the learned Judge at the trial was correct, and that therefore this rule should be discharged. I think, with Lord *Tenterden*, "that the object of the Legislature is, that the client should have a bill delivered to him in such language as he can understand," *Frowd* v. *Stillard* (*a*); and in thinking so, I do not believe I interfere with the decision of the Court of Queen's Bench in *Lewis* v. *Primrose*. The object, the Legislature had in view was, that the client should be furnished with means of investigating and disputing the various charges contained in the bill. It appears to me, that there is sufficient upon the face of this bill to shew both the name of the cause, and also of the Court, wherein the business was conducted. The commencement of the bill shews that there was a conference upon certain suits pending in the Court of Chancery, and, shortly afterwards, the name of a cause is mentioned, *Falkner* v. *Matthews*. If the name of one cause only appears upon the bill, shall we not take it that all the items enumerated were in the cause named. Several particulars were pointed out by my Lord, and which would shew to any person able to comprehend the general language in use, that the proceedings were in a Court of Chancery. Then follow various particulars relating to the hearing of a cause, and of attendances at Court upon the hearing; payment for a copy of the decree, and conferring upon the propriety of appealing from the decision of the Master of the Rolls. From all that follows, it seems clear to me that the cause was in the Court of Chancery, and that any person of ordinary understanding could easily ascertain in what Court the proceedings were taken. I therefore think that this is a bill sufficiently explicit within the statute.

ERLE, J.—It appears to me that this rule should be discharged. The statute requires the delivery of a signed bill,

(*a*) 4 C. & P. 51.

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and the construction of the Courts of law have superadded to the statute that it should appear in what Court the business was done. The bill, the subject of this action, has only the names of the solicitor and the clients. It seems agreed by us all, that if a person conversant with the English language, and gifted with an ordinary understanding, could ascertain, from matter appearing upon the face of the bill, that the proceedings were proceedings in a suit in Chancery, that that would be a sufficient compliance with the statute. It seems to me that this bill would be direction sufficient to such a person to shew to what Court he should apply to get the bill taxed. It commences by mentioning a Chancery suit, the name of one suit is afterwards given, and it continues mentioning proceeding after proceeding until the end. The defendant is consulted throughout; and mention from beginning to end is made of proceedings in Chancery. If a bill were delivered for an action at common law, and at the commencement mention were made of a writ issued out of the Court of Queen's Bench, the reasonable intendment would be, that the proceedings were taken in that Court. Looking to the strict legal interpretation of the requirements of the statute, I think the plaintiff did all that was requisite and necessary.

Rule discharged.

DALRYMPLE *v.* FRASER and DAWES.

A joint warrant of attorney having been given by two defendants, and one of them having been transported for life, the Court permitted judgment to be entered up against both, on an affidavit stating the conviction, and a certificate from the Home Office, certifying the transportation, and that no return of the convict's death had been made, and that by the practice of that office no return was made of a convict continuing alive; it being also sworn that the other defendant was still living.

DOWLING, Serjt., moved for leave to sign judgment upon a joint warrant of attorney given by the two defendants. The affidavit on which he moved stated that the defendant Dawes had been seen alive within the last three

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days. With respect to the defendant Fraser, it stated that he had been tried for forgery at the Central Criminal Court, and convicted on May the 18th, 1843. He was sentenced to transportation for life. The affidavit also stated that inquiries had been made at the Home Office as to whether Fraser was still alive, but that the answer was that it was not the practice to have any return except of the deaths of convicts sent to Norfolk Island, and that Fraser had been sent to that place. A certificate from the Home Office in these terms was annexed: "Home Office, Whitehall, 30th of January, 1846. I hereby certify that it appears upon reference to documents in this office, that Hugh Fraser, who was convicted of felony at the Central Criminal Court in May, 1843, and sentenced to transportation for life, was sent to Norfolk Island in the ship Maitland, in August 1843, and that his death has not been subsequently reported to the Home department. Signed, G. Everest, assistant clerk for criminal business."

PER CURIAM.—That is sufficient to entitle the plaintiff to sign judgment against both.

Rule granted.

C. 2. C.B. 654

ATKINS *v.* HUMPHREY and Another.

A plea by one of two persons charged as executors, that the other is not an executor, is bad.

A declaration for use and occupation against executors, charging them in respect of certain premises *held* by them as executors under a demise to their testator, but not alleging any occupation by them is good, under 11 Geo. 2, c. 19, as sufficiently charging them de bonis testatoris.

ASSUMPSIT. The declaration against the defendants, Humphrey and W. Scrivener, as executors of the last will and testament of J. Scrivener, stated that the defendants, as executors as aforesaid, were indebted to the plaintiff in 100*l.* for the use and occupation of certain messuages, tenements, lands, and premises, with the appurtenances, of the plaintiff, by the defendants, as executors as aforesaid, held of the plaintiff for a long time before then elapsed,

under and by virtue of a certain demise thereof theretofore made to the said J. Scrivener; and thereupon afterwards, to wit, &c., in consideration of the last mentioned premises, the defendants, as executors as aforesaid, promised the plaintiff to pay him the last mentioned sum; yet they, as executors as aforesaid, had not paid that sum, or any part of it.

Humphrey pleaded, in addition to other pleas, that the said W. Scrivener never was executor of the last will and testament of the said J. Scrivener, deceased, nor ever administered any of the goods or chattels which were of the said J. Scrivener, deceased, at the time of his death, as executor of the last will and testament of the said J. Scrivener, deceased, modo et formâ. Verification.

General demurrer, on the ground that the fact of W. Scrivener, one of the defendants, not being an executor, is no defence to the other defendant Humphrey. Joinder.

Channell, Serjt., in support of the demurrer. The plea here was bad, as it merely set up the exemption of another from liability as an answer to the action. It did not deny the demise or the cause of action. But the plea of ne unques executor was one of mere personal discharge, and could in no way be available by another defendant. If the plaintiff thought proper he might, according to the authorities in the note to *Salmon* v. *Smith* (*a*), enter a nolle prosequi as to the person who was not executor, and proceed against the co-defendant. On these grounds, therefore, the plaintiff was entitled to judgment.

Talfourd, Serjt., in support of the plea. In the present action the plaintiff sought to charge both as upon a joint liability. The effect of the present plea was to deny such joint liability. In effect, therefore, it amounted to the general issue; but as the demurrer here was general and not special, the objection in point of form was not available,

(*a*) 1 Wms. Saund. 207, (*a*).

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If the contract were not joint, the plaintiff could not succeed; *Griffiths* v. *Franklin and Fiestell* (*a*). In *Gray* v. *Palmer and Hodgson* (*b*), it was held, that where the plaintiff, on a joint and several promissory note declared against the defendants jointly, and they severed in their pleas, and one of them by his plea admitted his handwriting to the note, and the other pleaded non assumpsit, the plaintiff must prove at the trial the handwriting of both. That case was directly in point. It was similar to the ordinary case of one of two defendants in an action of contract suffering judgment by default, the other denying the contract. There it was always necessary to prove that both defendants were parties to the contract. [*Tindal*, C. J.—The plea is bad, as it amounts to nothing more than an allegation that one of the defendants has been misdescribed at the commencement of the declaration.] Even if the plea were bad, the declaration was defective. It alleged that the defendants, as executors, had become indebted to the plaintiff for the use and occupation of premises held of the plaintiff by the defendants under a demise to J. Scrivener, the testator, and that the defendants, as executors, promised the plaintiff to pay. If the declaration were sustainable at all against the defendants, it must be in respect of a contract which would charge them de bonis propriis. Here, however, they were charged as executors, but the premises alleged would not render them liable in that character. The objection could not be obviated by contending that no entry by the defendants was alleged; as if there was no entry, there could be no liability in respect of use and occupation. Supposing, therefore, that the words "as executors" were struck out, no liability would be shewn in any way.

Channell, Serjt., in reply. In *Wigley* v. *Ashton* (*c*) it was

(*a*) M. & M. 146.
(*b*) 1 Esp. 135.
(*c*) 3 B. & A. 101.

held, that a count in assumpsit against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife as administratrix for use and occupation by them after the death of the testator. The ground of that decision was, that on the latter counts the defendants would be liable de bonis propriis, as the defendants appeared to have occupied the premises, and on the former, to the extent of assets. Here, however, no statement of occupation was introduced, but the defendants were only alleged to have held the premises. It was therefore sought to charge them merely out of the assets in their hands in respect of an occupation by their testator. No doubt could exist, that as long as the term continued, they were bound to pay the rent.

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TINDAL, C. J.—As there is no special demurrer to the declaration, we must treat this question as if it arose on a general demurrer to it, and then, under that state of circumstances, we must say whether the declaration would be bad. I think it would not, because I can conceive a state of facts in which the plaintiff's claim, in its present form, would be good. The stat. 11 Geo. 2, c. 19, s. 14, upon which the action for use and occupation is founded, provides that, "it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant or defendants, in an action on the case for the use and occupation of what was so held or enjoyed." As far, therefore, as the very letter of the statute goes, which is couched in the alternative, it is sufficient to enable the landlord to recover, if the property has been only held. Now, I can suppose the case of a person taking land of another, but not entering upon it; in such a case he keeps the landlord out of possession, and there is no reason why he should not pay the price

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agreed upon. Then the present declaration states that the property was demised to the testator, and, without stating that the defendants entered, says, that they, as executors, became liable to pay the rent. It therefore shews a sufficient ground of action in respect of which they should make payment out of the testator's assets. If they do not choose to give up the land, those assets remain liable, though the executors may not be in the actual manual occupation of the property. I think, therefore, the declaration is good; and, as the plea is bad, there must be judgment for the plaintiff.

MAULE, J.—I think that the declaration is good, and the plea bad. It struck me at first as doubtful whether the declaration were not bad, but, upon reference to the statute, which provides that the landlord may recover in this form of action where the premises have been held or occupied, I think that the matters here alleged shew a good cause of action. I also think that it sufficiently discloses a liability on the part of the defendants in their representative capacity; for we must take the declaration to mean, unless it cannot be understood in that sense, that the executors held in such manner that they would be liable to pay the rent out of the assets. Now, if the testator held the property, and the executors never entered, they certainly would be liable to pay the rent out of the assets, and they would not be personally responsible; that is quite consistent with the statement in the declaration. Then, by the declaration, two persons are charged, and one pleads that the other is not executor, and that, in effect, is pleaded to the allegation in the commencement of the declaration, stating them to be executors. The allegation is that each is executor, and that is divisible, and a matter of personal exemption. It is like the plea of plene administraverunt, under which one defendant who has assets, may have a verdict against him, and cannot avail himself of the circumstance that his co-defendants have administered, and are entitled to a verdict.

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CRESSWELL, J.—I think that the declaration is good on general demurrer. It states that the defendants were indebted, as executors, for the use and occupation of certain land held by the defendants, as executors, under a demise made to their testator. The difficulty which occurred to my mind was, that the defendants could not be liable unless they occupied, and then they would be liable in their individual capacity; but I find that *Pinero* v. *Judson* (*a*) is a precise authority that actual occupation is not necessary to sustain an action under the statute. With respect to the plea, where several parties are charged as executors, each must deny the fact of his being an executor for himself; another cannot do that for him.

ERLE, J.—It seems to me that the whole of the allegation in this count of the declaration would be proved, by simply shewing a demise to the testator, and the continuance of it, so that rent accrued since his death. Those facts would render the executors liable to pay it out of the assets; and, therefore, I think the declaration is good.

Judgment for the Plaintiff.

(*a*) 6 Bing. 206; S. C. 3 M. & P. 497.

DRAGE *v.* BIRD.

In the affidavit to obtain a distringas, it is not sufficient to state that the defendant has not appeared "according to the exigency of the said writ;" it ought to state generally that he has not appeared.

WILKINS, Serjt., moved for leave to issue a distringas. The affidavit on which he applied stated the usual number of calls and appointments, and also disclosed circumstances from which it appeared that the defendant was keeping out of the way to avoid service of the writ of summons. In that part of the affidavit which stated the non-appearance

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of the defendant, it deposed "that the said defendant has not appeared according to the exigency of the said writ." [*Maule*, J.—Which may mean, that he has not appeared within the eight days mentioned in the writ of summons. It is quite consistent with that affidavit that he has appeared, though not within the eight days. The affidavit should state generally that he has not appeared.]

PER CURIAM.

Rule refused.

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1 C. & J. 2 C. B. 724

CLARKE *v.* DUNSFORD.

The venue in an action for criminal conversation was laid in Middlesex, and having been removed to Somersetshire, was brought back on the usual undertaking to give material evidence in M. It was proved at the trial, that the plaintiff had taken lodgings in S. under an assumed name, and that the letter by which the landlady of the lodgings accepted his proposal to become her tenant, was sent to him in M. at a hotel where he was stopping; that he afterwards wrote a letter, bearing a post mark such as a letter sent from M. would bear while stopping at the hotel, directing his apartments in S. to be prepared; that the plaintiff's wife met the defendant at those lodgings in S., where the adultery was committed: *Held*, by *Tindal*, C. J., *Maule*, J., and *Cresswell*, J., (*Erle*, J. dissentiente), that the evidence fulfilled the undertaking. *Held* also by the whole Court, that it was not necessary to shew that any part of the adultery had been committed in the county of Middlesex.

Query, whether the defendant was bound to produce the undertaking at the trial in order to raise the objection as to the insufficiency of the evidence.

4 Dowl. 347.

TALFOURD, Serjt., (*Butt* with him) shewed cause against a rule nisi obtained by Sir *T. Wilde*, to set aside the verdict which had been obtained by the plaintiff, with 5,000*l.* damages, and to enter a nonsuit. It was an action for criminal conversation with the plaintiff's wife, and the defendant pleaded not guilty. The plaintiff laid his venue in the county of Middlesex, but the defendant, on the common affidavit, changed it to the county of Somerset. The plaintiff afterwards brought back the venue, giving the usual undertaking to give material evidence in the county of Middlesex. At the trial it appeared that the place at which the adultery had been committed was in a house kept by a Mrs. Needes, in Norfolk Buildings, Bath. It was shewn that the defendant had gone to the house in question in the absence of Mrs. Needes, but had seen her sister, a Miss Withers, and applied to take apartments in

the house. Miss Withers declined giving a positive answer, but said she would communicate with her sister. The name given by the defendant then was Lyde. Miss Withers accordingly wrote to her sister on the subject, and on the 24th of July, the defendant, under the name of Lyde, also wrote to Mrs. Needes, requesting her to send an answer as to whether he could have the lodgings, and to direct her letter to "W. Lyde, Esq., the British and Foreign Hotel, George Street, Hanover Square, London." The object which the defendant represented that he had in taking the lodgings was to meet a lady there to whom he was privately married. Mrs. Needes, on the 25th of July, wrote an answer, accepting the proposal, and directed as required by the defendant. It appeared that on the 27th of July, the defendant went to the British and Foreign Hotel, but no evidence was given to shew whether he became possessed of the letter. He left the hotel on the 28th, and on the 29th called on Mrs. Needes, and informed Miss Withers that he had received Mrs. Needes' letter. He then paid four weeks' rent in advance, and, on the same day, the plaintiff's wife met him at the lodgings. They remained together in the bed room for a considerable time. It was also proved that the defendant had written a letter bearing the London postmark of the 25th of August, to Mrs. Needes, in his feigned name of Lyde, requesting that his lodgings might be prepared on the following day. He was at this time staying at the British and Foreign Hotel. On the following day he came to the lodgings, and the next day the plaintiff's wife visited him under circumstances similar to those of the former occasion. Several other visits appeared to have been paid by her to him at the lodgings between the time of taking the apartments and the last mentioned date. This was the evidence on the part of the plaintiff at the close of the case. It was submitted that the plaintiff had not fulfilled his undertaking to give material evidence in the county of Middlesex. On the part of the plaintiff, it was contended that the objection could not be sustained, unless the under-

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taking were produced, which was not done, and also that there was material evidence sufficient to constitute a compliance with the undertaking. The learned Judge reserved both questions, and left the case to the jury, giving the defendant leave to move to enter a nonsuit. A rule was accordingly obtained, and it was against this rule, that cause was now shewn. As to the first objection, the non-production of the rule by the defendant; that was sufficient to prevent the defendant from sustaining the objection. Unless the undertaking were produced, the learned Judge at the trial had no power to nonsuit. If he had not power to nonsuit, neither had the Court. He cited *How* v. *Pickard* (*a*); *Santler* v. *Heard* (*b*); *Watkins* v. *Towers* (*c*). Then as to the second point, sufficient evidence to fulfil the undertaking had been given by the plaintiff. It was not necessary to shew that the actual fact of adultery had taken place in the county of Middlesex, it was sufficient if evidence were adduced which was material in connecting the defendant with the fact of adultery. The answer sent by Mrs. Needes, accepting the defendant's proposal for taking the lodgings was received by the defendant in Middlesex, and then the contract for the lodgings at which the adulterous intercourse took place was made in Middlesex. Besides this, the letter of the 25th of August, bearing the London post mark, requiring his lodgings to be prepared, was also written in Middlesex, and there could be no doubt that the object of that letter was to make preparations for a repetition of the adultery. It was moreover necessary to shew the identity of the defendant as the person who had been stopping at the British and Foreign Hotel, which was in the county of Middlesex, and a portion of the evidence for that purpose was given by the waiters of that establishment. In *Gosling* v. *Birnie* (*d*) it was held, that proof of a conversation with the defendant in the cause, referring to

(*a*) 2 M. & W. 373; S. C. 5 Dowl. 606.
(*b*) 2 W. Bl. 1031.
(*c*) 2 T. R. 275.
(*d*) M. & M. 531.

matters involved in it taking place after the writ is sued out, will satisfy an undertaking to give material evidence in the county where the conversation took place. So in *Greenway* v. *Titchmarsh* (*a*), it was held that an undertaking to give material evidence of some matter in issue arising in a particular county, is satisfied by evidence arising in that county which bears on the amount of damages. That was an action for the breach of a warranty of a horse, and the issue raised on the pleadings was, whether the plaintiff bought the horse of the defendant or not, and the Court held that a payment in Middlesex for the keep of the horse, after notice to the defendant of its unsoundness, was sufficient to satisfy the undertaking. He cited *Collins* v. *Jenkins* (*b*); *Lawson* v. *Mangles* (*c*); *Linley* v. *Bates* (*d*); *Rex* v. *Burdett* (*e*); *Gilling* v. *Dugan* (*f*).

Sir *T. Wilde*, and *Channell*, Serjt., in support of the rule. The object of the undertaking was to secure to the defendant the trial of the issue raised between him and the plaintiff in the county wherein the cause of action arose. The statute of 6 Rich. 2, c. 2, as well as other statutes, were passed with this object. The statute of 4 Hen. 4, c. 18, had for its object the enforcement of the provisions of the 6 Rich. 2. At first, in the reign of Hen. 5, it appears the Courts examined the plaintiff on oath as to the truth of his venue, and afterwards the defendant was allowed to traverse the venue, and try the issue by the country. *Rastall*, tit. "*Debt*," 184, (B), and *Fitz. Ab.* tit. "*Brief*," 18. This practice, however, being productive of much delay, the Courts introduced the method of changing the venue upon motion, upon the equity of the statutes of Rich. 2, and Hen. 4; *Santler* v. *Heard* (*g*), 1 *Wms. Saund.* 74, n. (2). The cases cited on the other side were dis-

(*a*) 7 M. & W. 221; S. C. 9 Dowl. 279.
(*b*) 4 Bing. N. C. 225; S. C. 5 Scott, 589.
(*c*) 2 M. & Rob. 427.
(*d*) 2 Cr. & J. 659.
(*e*) 4 B. & A. 95.
(*f*) 1 C. B. 8.
(*g*) 2 W. Bl. 1031.

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tinguishable from the present, as were also the cases of *Curtis* v. *Drinkwater* (*a*), and *Cocherell* v. *Chamberlayne* (*b*). The law must still be considered for the purpose of determining this question to remain the same as if the defendant had traversed the venue laid by the plaintiff. The rule of 1 Reg. Gen., H. T. 2 Wm. 4, section 103, ordering that "the venue shall not be brought back except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid," was not intended to alter the law in this respect. If the venue had been traversed, it would have been necessary for the plaintiff to shew that part of the cause of action had arisen in the county of Middlesex. A similar necessity was imposed on the plaintiff in the present state of the practice. The cause of action was adultery. The other evidence which had been adduced only constituted necessary steps for the purpose of completing the proof. Next as to the question whether it was necessary for the defendant, in order to take the objection, that he should produce the plaintiff's undertaking at the trial. No case had decided that it was necessary so to do. In *How* v. *Rickard* it was only decided that it was necessary to take the objection at the trial, not that it was necessary to produce the undertaking. But there, it did not appear that any argument had taken place. The cases of *Bruckshaw* v. *Hopkins* (*c*); *Powell* v. *Rich* (*d*); *Neal* v. *Neville* (*e*), shewed that the proper mode of enforcing the undertaking was by nonsuit. But in order that the defendant might have the benefit of the nonsuit, it was no more necessary to produce the undertaking than the consent rule in an action of ejectment, and there the parties were entitled to the benefit of that rule by subsequent application to the Court. In *Doe* d. *Flemming* v. *Armfield* (*f*) it was decided, that in an ejectment, if the defendant does not appear and

(*a*) 2 B. & Ad. 169.
(*b*) 1 Taunt. 518.
(*c*) 1 Cowp. 409.
(*d*) 2 Marsh. 494; S. C. 7 Taunt. 178.
(*e*) 2 Marsh. 278; S. C. 6 Taunt. 564.
(*f*) 1 Dowl. 327, N. S.

confess lease, entry, and ouster, the lessor of the plaintiff need not produce the consent rule, but he may afterwards sign judgment against the casual ejector, and sue out execution. The case of *Doe* d. *Greaves* v. *Raby* (*a*), on the authority of which the last case was decided, was to the same effect. On these grounds, therefore, the rule for a nonsuit ought to be made absolute.

TINDAL, C. J.—The question in this case is, whether the plaintiff has complied with the terms of the rule, by which he undertook, at the trial of this cause, to give material evidence of some matter in issue arising in the county of Middlesex. The plaintiff did not by that rule, as in former times, undertake that the whole of the cause of action arose in the county, but that the evidence of some matter occurring within it should be material. The former state of the law with reference to this subject is to be found in the case of *Santler* v. *Heard* (*b*), where Mr. Justice *Blackstone* has searched out and collected all the authorities on this subject; and it thence appears that "originally it was required that the plaintiff should give no evidence at the trial but what arose in the county where the venue was retained; 1 *Keb.* 859; 1 *Sid.* 442. If he gave none such, he must have been nonsuited of course. But when it was laid down (more liberally) in *Swaine's case*, 1 Sid. 405, that the plaintiff might lay his venue in any county wherein *part* of the cause of action arose, he was then bound only to give *some* evidence, and not the *whole*, (dare aliquam evidentiam), in the county where the venue was laid; *Salk.* 669; 12 *Mod.* 515; which continues to be the rule at this day." Then, looking at the terms of this rule as contrasted with the old practice upon the subject, we must say whether the plaintiff has shewn any fact which materially conduced to prove the matter in issue. Now, the matter in issue in this cause was, whether the defendant in

(*a*) 2 B. & Ad. 948.

(*b*) 2 W. Bl. 1031.

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Somersetshire had committed adultery with the plaintiff's wife; and if the plaintiff proved any fact which had a tendency to establish that, he has complied with the rule. In the course of the argument it was said, that in determining what was material evidence, you must consider how far that fact was material at the trial, and that it was a question of degree, but I think it is sufficient if the fact was at any time substantially important with reference to the issue: and if it became material in the course of the cause, or if it were material at the time the undertaking was given, it is enough; for it would be a hard thing, if from some subsequent proceeding on the part of the defendant, or by his mode of pleading, the plaintiff might be taken ex improviso. The rule has therefore been established, that if the matter which the plaintiff can prove to have happened within the county was at any time material, it satisfies the undertaking. Now here, the charge being that the defendant had been guilty of an act of adultery, the question is, whether if you shew a complete plan and contrivance laid in the county of Middlesex, by which the plaintiff's wife was to be brought into contact with the defendant, you have not shewn what was material to be laid before the jury? Though it was not evidence of the actual fact of adultery itself, yet it was such as the jury might justly regard, as shewing a plot laid to carry into effect the guilty design which was actually carried into effect in Somersetshire. With reference to that point the facts are these, that the defendant, under an assumed name, wrote a letter from Swindon, requesting that an answer, informing him whether he could have the lodgings, should be sent directed to him under that false and assumed name, at the British and Foreign Hotel, in Middlesex. It was proved that he was then staying at that hotel, and that somebody got possession of the letter. He thereupon acted as if he were the person who did get possession of it, for he afterwards stated that he had received it, and why, under such circumstances, are we to assume that any other person

obtained it? That fact alone appears to me to constitute a virtual compliance with the rule, as it conduced materially to the finding of the issue.

MAULE, J.—I am of the same opinion; and though there are several points worthy of consideration, yet it appears to me it is only necessary to consider one. The action was for criminal conversation with the plaintiff's wife, to which the defendant pleaded not guilty; and the venue being laid in Middlesex, upon an affidavit that the cause of action arose in Somersetshire, the venue was removed. The plaintiff thereupon resolved to bring back the venue, undertaking at the time he did so, by the rule, to give material evidence of some matter in issue arising in the county of Middlesex; and it is upon the right construction of the expression or phrase used in that undertaking, that the present motion arises. Now, the evidence on the trial with reference to that was, that a letter was written to and received by the defendant in Middlesex, which constituted a contract with the person from whom he took the lodgings. It is quite clear, that in doing this the defendant represented himself under a false name, and as being under very different circumstances from his real ones. He falsely stated that he had been privately married, and that his object in taking the lodgings was to meet his wife there. The contract, therefore, was in order that the parties might meet as husband and wife. That contract appears to me to have been a most material fact, being a contract made in Middlesex, by which the defendant took lodgings, in order to commit adultery with the plaintiff's wife. In the argument on this question it was contended, on the one hand, that the undertaking was not complied with, unless some part of the cause of action arose in Middlesex; but, on the other, it was argued that this was not necessary, and that there may be material evidence to satisfy the rule arising in Middlesex, although the cause of action arose altogether out of it. I am of opinion that the latter

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position is the correct one, and that the undertaking may be complied with, notwithstanding no part of the cause of action really did accrue there. The argument in support of the defendant was founded, mainly on the form of the affidavit to change the venue, which states that the cause of action arose in Somersetshire; and also on the old law. I conceive, however, that the old and the new law on this subject are connected only historically, and that it is not to be assumed that the intention of the modern practice is to attain the same object, only more unceremoniously. Formerly it seems to have been considered desirable that the matter should be tried on the spot where the cause of action arose; but in later times, unless in cases where questions relating to land are concerned, the Courts have assumed to deal with the question of venue as they might think fit. In the ordinary affidavit, the Courts consider that the defendant shews sufficient reason, primâ facie, for changing the venue, if he says that the cause of action arose altogether elsewhere. But they also consider where, on the whole, it would be most convenient to try the cause, and that another place may be equally, or even more convenient, for that purpose. They, therefore, will change the venue for various reasons; as for example, that the witnesses are resident in another county, and upon other grounds of a like nature, not in order to bring the action to be tried where the cause of it arose, but to bring it to the place which is most convenient for its trial. And if we look at the terms of the undertaking, and construe them according to their natural import, we shall come to the conclusion that it is not necessary for the plaintiff to shew that any part of the cause of action accrued in the county to which it refers. The undertaking does not mention any thing about the cause of action accruing in the county; but the defendant, having stated that it did arise in the county to which the venue was changed, the plaintiff undertakes, not in those terms which would be used if they were intended, but something different being

intended, in different language. It is just the same as if a person were to say, all the witnesses in this cause live in Middlesex, and it is most convenient to try it there, though I admit the cause of action arose in Cumberland. According to the practice of the Court, if the party shew he has a good cause for laying the venue where it was laid, that is a compliance with what it requires. The undertaking, when looked at, is a confession and avoidance of the allegation in the defendant's affidavit that the cause of action arose in Somersetshire, and not elsewhere, and is not a denial of it. The cases which have been cited bear out this construction; thus in one, though the plaintiff admitted that the whole cause of action occurred in the county to which the venue had been changed, the Court said that the venue might be brought back on the ordinary undertaking. So in the case of *Lawson* v. *Mangles* (*a*), *Parke*, B., thought, that in an action by assignees, proof of the appointment of the plaintiff's assignees in London was a compliance with the rule; and he clearly lays down the law, that the production of any evidence which would have been material to support the cause or right of action alleged in the declaration, though it do not shew that the cause of action arose in the county, is sufficient to satisfy the plaintiff's undertaking. The bankruptcy there was no part of the cause of action. The rule, then, is not to be interpreted by the affidavit of the defendant or the old state of the practice; and, notwithstanding the cause of action may have arisen in Somersetshire, yet, if the party shew that some fact took place in Middlesex material to the issue, or which would have been material to the inquiry raised by the declaration, that would, in my opinion, be a compliance with the undertaking. Now, in the present case, I cannot conceive any thing short of proof that the cause of action actually arose in Middlesex, more material, than that the defendant in that county made a contract for

(*a*) 2 M. & Rob. 427.

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the express purpose of meeting this woman as his wife. If that were not sufficient, I must confess it appears to me that nothing would be sufficient, unless it were shewn that the cause of action actually did arise in the county. That the plaintiff should do so was not necessary, and, therefore, I think what he has done was a compliance with the undertaking.

CRESSWELL, J.—I also think, that on the true construction of the rule which has been commented on, the present rule must be discharged. The question upon it appears to me to rest on the practice of the Court, which is the law of the Court; and not upon the statutes. With respect to the evidence adduced, I think it cannot be disputed, that the evidence which the plaintiff gave of what occurred in Middlesex established two most material facts; and the question is upon the construction of the undertaking. With a view to construing that, it is important to see how this practice has arisen. In order to change the venue, it was incumbent on the defendant to make an affidavit that the cause of action arose in the county to which he was desirous of removing it, and not elsewhere. Then the plaintiff applied to bring it back; and in the mode of doing this, there was a little difference in the practice of this Court from that of the Court of Queen's Bench. In this Court the rule to bring it back was a rule nisi; in the Court of King's Bench, a rule absolute in the first instance: in the one, you might deny the allegations of the affidavit made in support of the application in the first instance; in the other, the venue having been changed, you were at liberty to bring it back, on shewing facts at variance with the affidavits. In neither of those proceedings to bring back the venue was it necessary to shew that the entire cause of action arose elsewhere; it was sufficient if the plaintiff shewed that any part of it arose elsewhere. Here the proceeding was not by means of an affidavit in answer to the application, negativing the facts stated in the affidavit

in support of it; but by an undertaking to give material evidence. Now, in *Guard* v. *Hodge* (*a*) it was held, in an action for criminal conversation, that the venue having been changed on the usual affidavit that the whole cause of action arose in Devon, it was sought to bring back the venue on an affidavit that the marriage of the plaintiff had taken place in Ireland. But the Court refused to act on that, as the marriage was no part of the cause of action, and decided that the venue could only be brought back on the usual undertaking. So in *Clarke* v. *Reed* (*b*), which was an action by the assignees of a bankrupt, it was held that it was no answer to an application, on the usual affidavit, to change the venue from London to Essex, that the commission issued, and bankruptcy was declared in Middlesex, and the assignees were chosen in London; and that the plaintiffs could only retain the venue on giving the undertaking. The ground assigned for that was, that the matters stated in the affidavit were no part of the cause of action, though they were material evidence to be given in support of it. The Court, therefore, said, you have not falsified the affidavit, therefore you must give the undertaking; clearly shewing that the undertaking was not equivalent in its terms to the affidavit, and that it did not bind him to shew that any part of the cause of action arose in the county. Suppose, in this case, that the plaintiff had given in evidence a conversation with the defendant in Middlesex, containing a circumstantial detail of his intercourse with the plaintiff's wife, and relied solely on that, could it be contended, that this would not have been a compliance with the undertaking? Under these circumstances, I think the true construction of the plaintiff's undertaking was, that he would give evidence of something occurring in Middlesex materially conducing to the proof of his case, and that having done that, this rule should be discharged.

(*a*) 10 East, 32.

(*b*) 1 New Rep. 310.

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ERLE, J.—I think that the terms of the plaintiff's undertaking have not been complied with. The evidence on the trial was, that a person who was identified as the defendant, called at the house at Bath, made inquiry as to the lodgings, stated his object for taking them, and, having given a false name, a letter was written to him under that name, in Middlesex, where he was proved to be, informing him that he could have the apartments; after which, he came to Bath, and acknowledged that he had received it, and that the plaintiff's wife called upon him there, where the act complained of took place. She visited him there on several occasions, and Mrs. Needes and the servant saw him and the plaintiff's wife at Bristol, and recognised them. Now all the material facts of the case occurred in Somersetshire, and were proved by Mrs. Needes, and, independently of the letter written to the defendant and received by him, her statement affords abundant evidence to support the action. It is true, that the facts proved to have happened in Middlesex, and the circumstance that the defendant was then at the place in Middlesex to which the letter was directed, tended materially to confirm her testimony, but that was a fact simply confirmatory; it was not direct evidence of any matter in issue. The main and important facts were brought home to the defendant by several intermediate and wholly distinct facts. I indeed agree with the rest of the Court, that it is not necessary for a plaintiff to shew that the cause of action, or that any part of it, actually accrued in the county. This was not an application to bring back the venue, on the ground that it did so arise; but the plaintiff merely said, I can prove facts which are material evidence of a matter in issue which happened in the county. For example, the marriage of the party is no part of the cause of action in such a case as this, but still it is part of the necessary proof to sustain the action. So in an action by assignees for goods sold and delivered, the fiat, adjudication, and appointment of assignees, are no part of the cause of action; yet those matters form part of

the issue; and, being so, proof of their having happened in the county would suffice. It appears to me, that the terms "material evidence of some matter in issue" mean proof of some fact which is indispensable to support the plaintiff's case, as alleged on the record. The language of the undertaking, I also agree, is to be construed with reference to the state of the record at the time the undertaking is given. This is exemplified by several cases which have been cited; and, even if the evidence adduced were to prove special damage, which is a matter in issue, I think it would be sufficient. But here, it appears to me, that the facts which occurred in Middlesex were not directly, or, per se, evidence of any matter in issue, and that the rule ought to be absolute.

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Rule discharged.

BEAUMONT *v.* GREATHEAD.

1 C 2 Cb. 494.

A plea of payment by one of several makers of a joint and several promissory note, is supported by proving a payment of the note by one of his co-makers.

Payment and acceptance of the amount of a promissory note after it becomes due, and when the holder is entitled to nominal damages, support a plea of payment and acceptance in discharge of the debt and damages: consequently the holder, after such payment and acceptance, cannot maintain an action for such nominal damages.

DOWLING, Serjt., shewed cause against a rule obtained by *Byles*, Serjt., to enter a verdict for nominal damages, or for a new trial in favour of the plaintiff. It was an action of debt on a promissory note for 50*l.*, dated the 20th of April, 1842, payable two months after date. The declaration also contained a count for money lent and on an account stated. The defendant pleaded payment to the whole declaration, in full satisfaction and discharge of all the moneys in the declaration mentioned; and the plaintiff replied, denying the payment modo et formâ. At the trial, before *Tindal*, C. J., at the sittings in London after last Trinity Term, it appeared that a person named Green having applied for a loan of 50*l.* to a society of which the plaintiff was trustee, it was arranged that the same should be advanced to Green; the present defendant, and a person named Jewson, in conjunction with Green,

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becoming joint and several makers of a promissory note for that sum. The note was given, and the amount, except 5*l.*, which was retained for discount, was paid to Green. The defendant and Jewson were in fact therefore, only sureties for Green. But that was not disclosed on the face of the note. After it became due, various sums, amounting to 50*l.*, were paid by Green to an agent of the Loan Society. The last of these sums was paid in the month of July, 1843. This was the evidence in support of the defendant's plea. It was objected, on the part of the plaintiff, that as the payments were here proved to have been made by Green, and not the defendant, the plea could in no way be considered as sustained, for Green could not be considered an agent for the defendant to make the payments, and, consequently, the plea was not proved. It was further contended, that assuming that the payments could be available in support of the plea, they were not sufficient for the purpose, as they did not shew anything to have been paid for the interest accruing between the 23rd of June, when the note became due, and July, when the last payment was shewn to have been made. These objections were overruled, and the case having been submitted to the jury, they found a verdict for the defendant. The present rule was afterwards obtained to enter a verdict in favour of the plaintiff, with nominal damages, or for a new trial, on the grounds before stated. First, as to the right of the plaintiff to recover nominal damages. That could only be in respect of interest. Whether the plaintiff was entitled to recover interest was a question entirely for the decision of the jury. They were perfectly at liberty to refuse to give the plaintiff interest if they thought proper, and when it was considered that the notes in question had been discounted at the rate of 60*l.* per cent., it could hardly be said that the jury had not exercised a sound discretion. Secondly, as to the objection that the payment by Green did not sustain the plea. It would be observed that the defendant was a joint maker of the note with Green. A

payment, therefore, by Green was, in point of law, a payment by the defendant, and might be so alleged in pleading. Possibly the case might be different, if the defendant appeared on the face of the note to be a surety, but here he appeared to be a principal debtor. [*Tindal*, C. J.—On the face of the promissory note there is nothing to shew that we have anything to do with the question of principal and surety.] Consequently the case came within the principle of *Whitcomb* v. *Whiting* (*a*), where, with reference to a similar question arising on the Statute of Limitations, Lord *Mansfield* said, "payment by one is payment for all, the one acting, virtually as agent for the rest." The cases of *Wyatt* v. *Hodson* (*b*); *Rew* v. *Pettet* (*c*); *Burleigh* v. *Stott* (*d*); and *Pease* v. *Hirst* (*e*), all shewed that a payment by one joint contractor was a payment by each. The payment here being by a joint contractor, supported the plea of payment by the defendant.

Byles, Serjt., in support of the rule. The promissory note not being paid at the day when it became due, a right to some interest accrued to the plaintiff. The payment therefore, of the principal sum secured by the note could not be a payment of the interest which thus accrued due; and, therefore, could not sustain the plea which was pleaded, both to the principal debt and the damages. The discount taken when the note was given, and on which possibly the jury acted, could not properly be taken into consideration. For the purpose of this question, the case must be treated as if the note was in the hands of an indorsee of the plaintiff for value. In that case, the indorsee would clearly be entitled to have the sum taken for discount excluded from the consideration of the jury. No doubt the period for which interest could be claimed was in the present instance

(*a*) 2 Doug. 652.
(*b*) 8 Bing. 309; S. C. 1 M. & Scott, 442.
(*c*) 1 A. & E. 196; S. C. 3 N. & M. 456.
(*d*) 8 B. & C. 36; S. C. 2 M. & R. 93.
(*e*) 10 B. & C. 122; S. C. 5 M. & R. 88.

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short, but it might be ten years, and then it could not be contended that the plaintiff was not entitled to some damages in the shape of interest. The law implied some damage accruing in consequence of the non-payment of the note at the date when it became due. This was, therefore, an attempt to pay a sum in discharge of a larger one, which could not be done. On this ground it was held that a plea of tender, in an action on a bill of exchange after the day of payment, was not good; *Hume* v. *Peploe* (*a*). Then with respect to the payment by Green. The promissory note given by the defendant and the two sureties in this case was, in point of law, three several promissory notes, and the defendant was sued upon this note as his several note. The payment, consequently, by one of the parties thus severally liable, could not constitute a payment by the defendant. The cases cited on the other side were all cases of payments to take the claims out of the Statute of Limitations. [*Maule*, J.—One would think that the cases on the Statute of Limitations were rather à fortiori that such a payment by one would be payment by each. The question there is, whether there has been an admission by you, the defendant, within six years. In order to prove that admission, the plaintiff shews that your co-contractor admitted the debt by means of a payment, and that is held to be sufficient. If, then, he is your agent, to bind you against your will, although you repudiate the payment, can it be said that he is not your agent, when you are willing to adopt his act as your own? According to your argument, a co-contractor is an agent for the other party to pay part of the debt, and so to bind him by an acknowledgment; but he is not an agent to pay part, and so to discharge him.] If the payment had been made in the name of the defendant, and had afterwards been adopted by him, the case might have been different; but where the payment was made by Green in his own name, the mere subsequent

(*a*) 8 East, 168.

adoption of that payment by the defendant would not make it a payment by him. Thus in *Wilson and Another* v. *Tumman and Another* (*a*), it was held, that where A. does an act as agent for B., without any communication with C., C. cannot afterwards, by adopting that act, make A. his agent, and thereby incur any liability, or take any benefit, under the act of A. [*Cresswell*, J.—Suppose there were several defendants, and they pleaded payment separately, the finding on one of those pleas in favour of the party whopleaded it, would be an answer to the action.]

TINDAL, C. J.—The question is, whether the evidence supports the plea, which states, that after the accruing of the cause of action, the defendant paid to the plaintiff, and the plaintiff then accepted and received from the defendant, divers sums of money, amounting, to wit, to all the moneys in the declaration mentioned, in full satisfaction and discharge of the debt and damages in the declaration mentioned. The jury have given no actual damages, and, therefore, the plaintiff is only entitled to nominal damages at most, for the detention of the debt. Under these circumstances we are called upon to say, whether if a man receives the amount of the actual debt itself, he could still maintain an action for that nominal damage. I am not aware of any authority which shews that he can maintain such an action; and, in the absence of any authority, I should be disinclined to lay down a rule that he could do so.

MAULE, J.—The plea in the present case is a plea of payment of a sum of money, the amount of which is not precisely ascertained, so that the point we have to decide does not appear upon the record, it arises on the evidence. That point is, whether, after default on a simple contract for 50*l.*, in respect of which the defendant is liable to

(*a*) 6 M. & G. 236; S. C. 6 Scott. N. R. 894; *ante*, vol. 1, p. 513.

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nominal damages, if the party accept that sum, he can afterwards sue for those nominal damages. I think he cannot. Those nominal damages, in fact, are introduced solely for a technical purpose, because the Statute of Gloucester, (6 Ed. 1, c. 1, s. 2) says "damages;" and are, in effect, only a peg to hang costs on. The creditor, for example, says, you owe me a debt of 50*l.*, and a nominal sum; the debtor thereupon takes out 50*l.*, and pays it to him, saying, here is the 50*l.* debt, and the nominal sum. That nominal sum means, in fact, no sum at all; it is not merely an insignificant sum, but a sum which does not exist, in point of quantity, at all. It has a mere fictitious existence; and, therefore, I say, a man may well receive 50*l.* in satisfaction and discharge of a debt of 50*l.* and nominal damages. Then the jury, not being bound to give interest, have rightly found that the 50*l.* were paid and accepted in satisfaction of the debt and damages. With respect to the other point, as to this being alleged to have been a payment by the defendant, that payment was made upon a note which was joint and several; the money was paid in discharge of each debtor separately, and all jointly; and if the receiver accepted it on those terms, the proper mode of stating such a payment was as a payment by each.

CRESSWELL, J.—Assuming that the question is not upon the record, the question is, whether my Lord was bound to tell the jury that they must find a verdict for the plaintiff for a nominal sum. I think he was not; but that it was competent for the plaintiff to accept 50*l.* in satisfaction of the debt and the nominal damages. It is true that the payment of a smaller sum is, in point of law, no satisfaction of a larger sum; but I am not aware of any case in which an action has been brought for nominal damages only, where the actual debt has been paid. Possibly the question is upon the record, for the plea only states that the defendant paid, and the plaintiff accepted, divers moneys, amounting to all the moneys in the declaration mentioned,

and, if that be interpreted as the principal debt, and not the damages, then the question is upon the record, and the plaintiff may remove it to another Court. With respect to the other point, I concur in the opinion expressed by the rest of the Court.

ERLE, J.—I can see no ground for entering a verdict for the plaintiff. There is no authority that I am aware of for saying that a sum of money may not be paid in satisfaction of a debt for that amount, and nominal damages for its detention; and that if it be accepted, the party may nevertheless afterwards sustain an action for that damage. It would be a very pernicious rule if it were so. Justice requires that the payment of one co-contractor should be considered as the payment of each of the contractors; and, therefore, I think the objection as to the form of plea in that respect is unfounded.

Rule discharged.

LEWIS *v.* LORD KENSINGTON.

TALFOURD, Serjt., obtained a rule nisi to set aside a warrant of attorney, on the ground that the attestation did not comply with the provisions of the 1 & 2 Vict. c. 110, s. 9. The attestation was in this form: "Signed, sealed and delivered in the presence of H. Whitaker, 10, Lincoln's Inn, attorney for the said Lord Kensington, expressly named by him, and attending at his request, and I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney before the same was executed by him, and I hereby subscribe my name as a witness to the due execution thereof."

"Signed, sealed and delivered, in the presence of H. Whitaker, 10, Lincoln's Inn, attorney for the said Lord Kensington, expressly named by him, and attending at his request, and I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of

the above warrant of attorney, before the same was executed by him, and I hereby subscribe my name as a witness to the due execution thereof:" *Held*, a sufficient attestation within the provisions of the 1 & 2 Vict. c. 110, s. 9.

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Sir *T. Wilde*, Serjt., shewed cause against this rule, and cited the following cases; *Poole* v. *Hobbs* (*a*); *Potter* v. *Nicholson* (*b*); *Elkington* v. *Holland* (*c*); *Everard* v. *Poppleton* (*d*); *Hibbert* v. *Barton* (*e*); *Knight* v. *Hasty* (*f*).

Talfourd, Serjt., (*Peacock* with him,) supported the rule. As the arguments are fully noticed in the judgment of the Court, they are not given here at length.

Cur. adv. vult.

TINDAL, C. J.—The question in this case is, whether a warrant of attorney executed by Lord Kensington was properly attested within the meaning of the statute 1 & 2 Vict. c. 110, s. 9.

By that act it is provided, that no warrant of attorney or cognovit shall be of any force, "unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

The act, therefore, requires the attorney so named to be present and acting on behalf of the defendant, both before and at the time of the execution of the warrant of attorney, and also afterwards, when he gives authenticity to the execution, by signing his name as a witness; and, in order to secure this, the act directs that he shall in the attestation

(*a*) 8 Dowl. 113.

(*b*) 8 M. & W. 294; S. C. 9 Dowl. 808.

(*c*) 9 M. & W. 659; S. C. 1 Dowl. 643, N. S.

(*d*) 5 Q. B. 181; S. C. 1 D. & M. 322.

(*e*) 10 M. & W. 678; S. C. 2 Dowl. 434, N. S.

(*f*) Cited from 12 Law Jour. 293, Q. B. Rep.

declare that he is the attorney of the defendant, and state that he subscribes as such attorney.

In the present case, the attestation was as follows: "Signed, sealed and delivered, in the presence of H. Whitaker, 10, Lincoln's Inn, attorney for the said Lord Kensington, expressly named by him, and attending at his request, and I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him, and I hereby subscribe my name as a witness to the due execution thereof."

To this attestation two objections were taken. It was contended, first, that there was no proper subscription of his name by the attesting witness, the name appearing in the middle of the attestation, and not at the end of it, and that it is uncertain whether the words subsequent to the name H. Whitaker are to be considered as the words of Whitaker or not.

But it must in all cases be a matter of extrinsic proof, whether the name of the attesting witness is in his handwriting, and, in the present case, it appears that the name H. Whitaker was the proper handwriting of the witness, and it seems to us, that the precise place where the name is written is not material, so long as it appears upon the face of the attestation that the attestation contains an assertion that all has been done by the witness which the act requires; for the act does not require the witness to subscribe his name at the foot of the attestation, but only that he should subscribe his name as a witness "to the due execution thereof." Therefore the name seems to us not inaptly to be placed immediately after the words signed, sealed and delivered; and, as there is no other subscribing witness than Mr. Whitaker, it is clear that the concluding words "I hereby subscribe my name as a witness to the due execution thereof," must be taken to be the words of the witness, who is the only person speaking, and, consequently, in conformity with the ordinary rules of gram-

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matical construction, the preceding words "I hereby subscribe myself to be the attorney," &c., must also be taken to be his words. This objection, therefore, we think, ought not to prevail.

The second and principal objection was, that the attestation did not comply literally with the act of Parliament, as it was said that it neither contained a declaration by the witness that he was the attorney, nor a statement that he had subscribed it as such attorney. In support of this objection various cases were cited, all of which, however, may, we think, be distinguished from the present.

The first was *Poole* v. *Hobbs* (*a*). In that case the attestation was as follows: "Witness, George Edwards, defendant's attorney, named by him, and attending at his request." The attestation in that case contained no express statement that he subscribed as the attorney for the defendant, nor anything that could be considered as equivalent.

The next case cited was *Potter* v. *Nicholson* (*b*). The attestation was as follows: "Joseph Bamford, one of the attorneys of her Majesty's Court of Exchequer of Pleas at Westminster, attending for the said William Nicholson at his request, to, and did inform him of the nature and effect of the above cognovit before the execution thereof by him." This attestation was also defective, as it did not state that he subscribed as such attorney.

The next case cited was *Elkington* v. *Holland* (*c*). The attestation in that case was as follows: "Signed, sealed and delivered by the said Joseph Ankers in my presence, and I subscribe myself as attorney for the said Joseph Ankers, expressly named by him to attest his execution of these presents." This attestation was held insufficient by Baron *Alderson*, because it did not contain any express statement that he was the attorney, the statement that he subscribed as the attorney not amounting to a declaration that he was the attorney.

(*a*) 8 Dowl. 113.
(*b*) 8 M. & W. 294; S. C. 9 Dowl. 808.
(*c*) 9 M. & W. 659; S. C. 1 Dowl. 643, N. S.

The next case cited was *Everard and Another* v. *Poppleton and Another* (*a*). The attestation there was "Signed, sealed and delivered by the abovenamed George Charles Poppleton, in the presence of us, of whom the said John Hope Shaw is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained, to the said George Charles Poppleton, before the execution thereof by him. John Hope Shaw, attorney, Leeds. John Richardson." This attestation was also held defective, as not containing any statement that the witness subscribed as such attorney.

The last case, and the one most relied upon, was the case of *Hibbert* v. *Barton* (*b*). The attestation in that case was as follows: "Witnessed by me, William Pemberton, as the attorney of the said William Barton, attending at the execution hereof at his request, and expressly named by him. William Pemberton, Prescot, Lancashire." The objection urged, (and which the Court appears to have acceded to) was, that the attestation did not contain an express allegation that the witness was the attorney employed in the transaction, but only a statement that he witnessed it as the attorney.

The present case, however, is, we think, distinguishable from all these cases; for the attestation contains first, the words "Signed, sealed and delivered, in the presence of H. Whitaker, attorney for the said Lord Kensington, expressly named by him, and attending at his request." And this appears to us a sufficient allegation of his being the attorney employed in the business by Lord Kensington, and for this the case of *Knight* v. *Hasty* (*c*) is an express authority; and we think, that the words immediately following the signature "I hereby subscribe myself to be the attorney for him," are equivalent to an allegation that he subscribes as such attorney.

(*a*) 5 Q. B. 181; S. C. 1 D. & M. 322.

(*b*) 10 M. & W. 678; S. C. 2 Dowl. 434, N. S.

(*c*) 12 Law Jour. 293, Q. B. Rep.

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We think, therefore, that in this case there has been a substantial compliance with the requisitions of the statute; and that the rule ought to be discharged; and as there is no justice in the defendant's complaint, it should be discharged with costs.

Rule discharged, with costs.

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1 C.-2. CB. 675.

WOOD *v.* KERRY, Executor, &c.

A plea of ne unques executor may conclude to the country.

THE declaration in this case was in debt against the defendant, as executor of the last will and testament of S. Kerry, deceased, for goods sold and delivered to the testatrix in her lifetime.

The defendant pleaded that he, the defendant, never was executor of the last will and testament of S. Kerry, deceased, nor ever administered any of the goods and chattels which were of the said S. Kerry, deceased, at the time of her death, as in the declaration is alleged; and of this the defendant puts himself upon the country, &c.

To this plea there was a special demurrer, upon the ground that since it introduced new matter, it ought not to have concluded to the country, but should have concluded with a verification. Joinder.

Dowling, Serjt., in support of the demurrer. The plea in the present case improperly concluded to the country, as it introduced new matter, in alleging that he never was executor, nor ever administered any of the goods and chattels which were of the deceased. [*Tindal*, C. J.—Does not the term "executor" include an executor de son tort.] Not primâ facie. If the plaintiff sought to charge him in that character, he ought to allege in his replication that he had administered. [*Maule*, J.—In *Scott* v. *Wedlake* (*a*), the Court of Exchequer Chamber held that the term executor used in a declaration, comprehended an

(*a*) In the Exch. Ch. in error, Trin. Vac 1846.

executor de son tort as well as an executor by probate.] In that case the plea was ne unques administratrix; but the Court only decided that such a plea as the present need not necessarily conclude to the country. If such a plea *may* conclude with a verification, it *must* so conclude according to the general rules of pleading. Again, it involved matter to which the plaintiff was entitled to reply. In *Com. Dig.* tit. "*Pleader*," (2 D 7) it was laid down, "to a plea of ne unques executor, the plaintiff may reply that the defendant has administered." If, therefore, the plaintiff sought to charge the defendant as executor de son tort, that was properly the subject of the replication. The defendant, however, by his mode of pleading, had excluded the plaintiff from so doing. [*Tindal*, C. J.—What is meant by that passage is, that if the defendant has not put in issue the fact of his having administered, the plaintiff may reply it. *Maule*, J.—An executor may be constituted in several ways, as by prerogative or diocesan probate, or in any other manner.] The replication that the defendant was executor de son tort would be bad, if he could be charged on this declaration. [*Maule*, J.—That would not necessarily be so, as the replication would then only narrow the issue.] If the defendant pleaded a retainer, the plaintiff, to avoid the effect of the plea, must reply that the defendant was executor de son sort; *Alexander* v. *Lane* (*a*). That was sufficient to shew, that although the fact of the defendant being an executor de son tort might be implied so as to charge him on a declaration on this form, it was necessary that the plaintiff should allege the facts specifically. As the record now stood, there was in fact no negative and affirmative, as there was a denial by the plea of something that was not properly alleged in the action; *Wheatley* v. *Williams* (*b*).

Channell, Serjt. The plaintiff would be at liberty under

(*a*) Yelv. 137.

(*b*) 1 M. & W. 533.

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this form of declaration, to charge the defendant either as an executor by probate, or de son tort. In the note to *Osborne* v. *Rogers* (*a*), the reason appears to have been "for he can only be charged in the writ and declaration as executor generally; for there is no other form, whether he be a rightful or a wrongful executor;" citing *Coulter's case*, 5 *Rep.* 30. No doubt the defendant, according to the authorities, might conclude with a verification, but he might also conclude to the country. The judgment of the Court in *Scott* v. *Wedlake* (*b*) supported this proposition. The Court there said, that, in the case of defendants charged as executors, the decisions had so far established that a conclusion to the country was proper, that its propriety could not now be questioned, even although the reason for the rule could not be discovered. They also said, that the plea, in denying that the defendant was executor of the last will, or administered as executor, did no more than deny what the allegation in the declaration, that the defendant was executor of the last will, was to be understood as importing; and that it was certain that a declaration charging a defendant as executor of the last will, comprehended an executor, who, although not executor of the last will, became liable by administering as such; and, that consequently, a plea denying the administering as executor, was not introductory of new matter. That case was, therefore, a clear authority to shew that the plea was unobjectionable in concluding to the country.

Dowling, Serjt., replied.

TINDAL, C. J.—The question is, whether the conclusion of the present plea to the country is wrong, and it is not necessary for us to decide whether it might not conclude with a verification. Now, I think it is a necessary conclusion, from the case of *Scott* v. *Wedlake*, that the issue raised by the plea is no more than an answer to all that is charged

(*a*) 1 Wms. Saund. 265, n. (2), 6th ed.
(*b*) In the Exch. Ch. in error, Trin. Vac. 1846.

in the declaration, and, therefore, that it may conclude to the country. All the authorities from *Coulter's case* (*a*) say that the proper mode of declaring is against the party as executor, and expound that term as including a rightful executor, or an executor de son tort. The plaintiff then says by his declaration, you, the defendant, are an executor by right or by wrong, to which the defendant, by his plea says, I am neither. That is a negative of the allegation in the declaration, and, it seems to me, properly concludes to the country. At the same time, possibly, such a plea may conclude with a verification, and offer to the plaintiff the choice of which character he will rely on; but as this plea includes either, I think it is right.

MAULE, J.—I am of the same opinion. The declaration charges the person in the common form as executor, and that, primâ facie, would appear to be an executor by probate from the Ecclesiastical Court. It is certainly singular that this term should include any other than an executor by will; but, nevertheless, it is undoubtedly the law, that an executor de son tort may be alleged to be an executor generally. The reason for this seems to have been, that no other writ can be found in the register. The result then is, that the allegation that the defendant is executor, means an executor by will, or executor not so appointed, including both species. The allegation comprehending both would be proved by shewing the defendant to be either, just in the same manner as you might shew, against an administrator, administration to have been granted by one bishop or another. Then the plea says, I have not been an executor in any way you charge me; and, primâ facie, such a plea ought to conclude to the country. The course of the precedents, however, is, that it may conclude with a verification, and that it may do so is recognised in *Scott* v. *Wedlake*. But it is quite another proposition that it must so conclude. *Scott* v. *Wedlake* says only that it may; and

(*a*) 5 Rep. 30.

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the paradox consists in this, that it may so conclude. The reason for that may have been, that there was the distinction between this and ordinary cases, that in them no fresh issue whatever could be raised; but in this the plaintiff may raise an issue as to the particular species of the genus, executor, to which the defendant belongs. The case of *Scott* v. *Wedlake* (*a*) seems to me to shew, that if the defendant does not choose to avail himself of the advantage of delay, he may waive the necessity for a replication, and take issue at once.

CRESSWELL, J.—It is a privilege which the defendant has of concluding to the country if he pleases.

Leave to amend, or judgment for the Defendant.

(*a*) In the Exch. Ch. in error, Trin. Vac. 1846.

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8 C. 2 CB. 634 CHAPMAN and Another v. SUTTON.

"In consideration of advances made and to be made by T. C. and S. C.," "or by any other persons of whom their firm may from time to time consist, to F. we jointly and severally hereby guarantee to the said T. C. and S. C. the repayment of the said advances, and to indemnify them against any loss by reason of such advances, our liability not to exceed the sum of 1000*l.* This guarantee to be a continuing guarantee, and to be a security to the said T. C. and S. C. to the extent of 1000*l.* as aforesaid, for the whole of any balance which may from time to time, or at any time, become due to the said T. C. and S. C., or to the persons for the time being constituting the firm of the said banking-house:" *Held*, that this guarantee disclosed a good consideration for the promise to pay past as well as future advances, the future advances having been made. T. C. and S. C. declared upon this guarantee, and alleged that past advances had been made, and that in consideration of the advances so made, and that the plaintiffs would from time to time make advances to F., the defendant and one H. jointly and severally guaranteed to the plaintiffs the repayment of the said last mentioned advances, that the said guarantee should be a continuing guarantee to the extent of 1000*l.* for the whole of any balance which might become due to the plaintiffs, or to the persons for the time being carrying on the said trade or business. The declaration then averred that advances were afterwards made by the plaintiffs to F.: *Held*, first, that there was a variance in the statement of the consideration, as it was the making advances by the plaintiffs, or any persons who might constitute the firm; secondly, that there was a variance in the statement of the promise, it being to pay what might be due to the plaintiffs, or those persons who might constitute the firm; thirdly, that those variances might be amended by a Judge sitting at nisi prius; fourthly, that a term in a special case that the Court should be at liberty to amend any part of the pleadings as they might think proper, gave no additional power beyond that possessed by a Judge at nisi prius.

ASSUMPSIT. The declaration stated, that at the time of the making of the promise of the defendant as hereinafter mentioned, and from thence hitherto, the plaintiffs

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exercised and carried on the trade and business of bankers in copartnership, and before and at the time of the making of the said promise of the said defendant, the plaintiffs had advanced to one G. Fielding divers sums of money, amounting, to wit, to 2,685*l.* 10*s.* 10*d.*, and the said G. Fielding was then indebted to the plaintiffs in the amount thereof; and thereupon heretofore, to wit, on the 7th of August, 1838, in consideration of the said advances so made as aforesaid, and that the plaintiffs would from time to time make advances to the said G. Fielding, of moneys in the way of loan, payments, discount, or otherwise, the defendant and one Robert Howland jointly and severally guaranteed, and then promised to the plaintiffs aforesaid, the repayment of the said last mentioned advances, and to indemnify them against any loss by reason of such advances, provided that the liability of the said R. Howland and the defendant was not to exceed the sum of 1000*l.*; and the defendant and the said R. Howland then also, for the consideration aforesaid, promised the plaintiffs that the defendant's said guarantee and promise should be a continuing guarantee, and a security to the plaintiffs to the extent of 1000*l.* as aforesaid, for the whole of any balance which might from time to time, or at any time, become due to the plaintiffs, or to the persons for the time being carrying on the said trade or business. And the plaintiffs aver, that they, confiding in the said promise of the defendant, did afterwards, to wit, on the 8th of August, 1838, and on divers days and times afterwards, make to the said G. Fielding, at his request, divers advances of moneys, in the way of loan, payments, discount, and otherwise, amounting, to wit, to 10,000*l.*; and although the time for the repayment of the said advances had elapsed before the commencement of this suit, and although the said G. Fielding was afterwards, and before the commencement of this suit, to wit, on the 1st of July, 1844, requested by the plaintiffs to pay them the same: yet he hath not paid the plaintiffs the same, or any part thereof, whereof the defendant and the said

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R. Howland afterwards, to wit, on the day and year last aforesaid, had notice; yet the defendant and the said R. Howland have not, nor hath either of them, paid to the plaintiffs, or either of them, the sum of 1000*l.*, parcel of the said advances so due and owing as aforesaid, or any part thereof, and the said sum of 1000*l.* still remains wholly due and unpaid to the plaintiffs. Damages, 1,500*l.*

Plea, non assumpsit.

The parties consented to the statement, under the 3 & 4 Wm. 4, c. 42, s. 25, of the following case, of which the pleadings were agreed to be considered as forming part. For some time previous to, and on and since the 7th of August, 1838, the plaintiffs carried on business as bankers at Aylesbury. For some time previous to the said 7th of August, 1838, G. Fielding had been a customer of the bank, and on that day, at the time the guarantee hereafter mentioned was given, the state of the accounts between the said G. Fielding and the plaintiffs was as follows, viz.:

Amount of advances made to Fielding -	£20,507 10 5
Amount repaid - - - - -	18,821 19 7
Making the balance then due to the plaintiffs by Fielding - - -	1,685 10 10

On the said 7th of August, 1838, the defendant and Robert Howland gave the plaintiffs a guarantee in writing, signed by them the said Robert Howland and the defendant, viz. "in consideration of advances made and to be made, by Messrs. Thomas Chapman and Thomas Sands Chapman, of Aylesbury, bankers, or by any other persons, of whom their firm may from time to time consist, in the way of loan, payments, discount or otherwise, to George Fielding, of Thane, in the county of Oxford, ironmonger, we jointly and severally hereby guarantee to the said Thomas Chapman and Thomas Sands Chapman, the repayment of the said advances, and to indemnify them against any loss by

reason of such advances, our liability not to exceed the sum of 1000*l.* This guarantee to be a continuing guarantee, and to be a security to the said Thomas Chapman and Thomas Sands Chapman, to the extent of 1000*l.* as aforesaid, for the whole of any balance which may from time to time, or at any time, become due to the said Thomas Chapman and Thomas Sands Chapman, or to the persons for the time being constituting the firm of the said banking-house. Dated this 7th of August, 1838."

(Signed) "ROBERT HOWLAND,
"THOMAS SEGRAVE SUTTON."

On the same day, the plaintiffs advanced to the said G. Fielding 1000*l.* After the day on which the said guarantee was given, the plaintiffs advanced to the said G. Fielding various other sums; of which there remained due to the plaintiffs, before the commencement of this suit, and still remains, a balance far exceeding 1000*l.* The question for the opinion of the Court is, whether the plaintiffs are entitled to recover. The Court are to be at liberty to amend any part of the pleadings, as they may think proper.

Channell, Serjt., (*Willes* with him), appeared for the plaintiffs. It was clear, from the case of *Kennaway* v. *Treleavan* (*a*), and also from *Johnston and Others* v. *Nicholls* (*b*), that in order to constitute a valid consideration it was not necessary that it should be co-extensive with the promise. If some consideration applied in respect of which the promise was made, that was enough. Here the guarantee disclosed the consideration of future advances, which was sufficient to sustain the promise to pay past and future advances. [*Cresswell*, J., referred to *Haigh* v. *Brooks* (*c*), in which it was held, that the giving up of a

(*a*) 5 M. & W. 498.
(*b*) 1 C. B. 251.
(*c*) 10 A. & E. 309; S. C. 2 P. & D. 477.

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guarantee void by the Statute of Frauds for want of consideration, was sufficient to sustain a promise to pay a sum of 10,000*l.*] If the case of *Raikes* v. *Todd* (*a*) were cited on the other side, it was clearly distinguishable from the present case. The memorandum in writing there was in these terms: "I hereby undertake to secure to you the payment of any sums you have advanced, or may hereafter advance, to Messrs. D. & Co. on their account with you, commencing the 1st of November, 1831, not exceeding 2000*l.*" The decision of the Court in that case proceeded on the impossibility of ascertaining what was the consideration for which the defendant made his promise, and, as the Court could not determine that the consideration alleged in the declaration was proved by the language of the guarantee, it was held that the plaintiff could not recover. But here clearly a good consideration was disclosed on the face of the guarantee, and, consequently, the promise alleged was well sustained. It was true the plaintiffs were not bound by the guarantee to make further advances; but if they did, then the defendant's guarantee was binding upon him. The case of *The Fishmongers' Company* v. *Robertson* (*b*) was an authority to that effect. There it was held, that although a particular contract was such as could not be a valid contract as against the corporation, unless it were under seal; yet that having been executed on the part of the corporation, and the defendants having received the full consideration, the latter were bound by the contract, and the plaintiffs were entitled to sue thereon. Then a question would arise, whether there was not a variance between the contract alleged in the declaration and the guarantee. The guarantee stated the contract to be in respect of advances already made, and afterwards to be made, by the plaintiffs, or any other persons of whom their firm should consist. The latter part relating to the change of persons was a contingency, but

(*a*) 8 A. & E. 846; S. C. 1 P. & D. 138.
(*b*) 5 M. & G. 131; S. C. 6 Scott. N. R. 56.

which had never occurred, as no change had taken place in the individuals constituting the plaintiffs' firm, and, consequently, it was not necessary, in the statement of the contract, to mention the contingency. Then in the statement of the promise it was also contended, on the part of the defendant, that there was a variance, as the promise was stated in the guarantee to pay all advances past and future, and the promise as alleged in the declaration was to pay the "last mentioned advances." These latter words, according to grammatical construction, would only refer to future advances. This, however, was not at variance, because it was only a contraction, and not an extension of the defendant's promise, and was, therefore, unobjectionable. If, however, any doubt existed, it was a variance which might be amended under 3 & 4 Wm. 4, c. 42, or under the power that was reserved to the Court by the terms of the special case.

Sir *T. Wilde*, Serjt., (*Crompton* with him), appeared for the defendant. The promise of the defendant to pay past and future advances was not several, and, therefore, the declaration only stating the promise to be to pay future advances, that was a variance. Again, there was a variance in the statement of the consideration. It appeared by the guarantee that the consideration was, that the plaintiffs or any other persons of whom the firm might consist, would make advances to the defendant. But in the declaration it was alleged to be advances made by the plaintiffs only. It could not successfully be contended, that as the change in the members of the firm was a contingency which had not happened, it need not therefore be alleged in the declaration. It was necessary that the Court should see all the consideration which, at the time of making the contract, induced the parties to enter into it. These variances were not amendable under the statute of 3 & 4 Wm. 4, c. 42, as the effect of an amendment would be to introduce a totally different contract from that which the defendant

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was prepared to meet, and to which he had pleaded. The power reserved by the case to amend did not authorize the Court to do more than the statute empowered them to make.

TINDAL, C. J.—I think the words of the case, authorizing the Court to amend, do not extend our power beyond that which a Judge at nisi prius would have under the statute.

The rule is, that the whole of a consideration supporting a promise should be alleged. Here the guarantee shews the consideration of the defendant's promise to be the past and future advances made by the plaintiffs, or by any other persons of whom their firm might from time to time consist. The declaration, however, wholly omits the possible change in the plaintiffs' firm. That is a material part of the consideration on which the promise was founded. This, I think, is a variance, but I am of opinion that it may be amended.

MAULE, J.—As there may be some doubt upon the point, I think it desirable the amendment should be made.

The following amendments were then made. The words "from time to time" were struck out, and the words "or any other persons of whom their said firm might from time to time consist," substituted. The words "last mentioned" were struck out. The words "carrying on the said trade or business" were struck out, and the words "constituting the firm of the said banking-house" introduced. Immediately after the words "did afterwards," the words "and whilst they were and constituted the said firm," were inserted.

Sir *T. Wilde*, Serjt., then contended that the two accounts of the past and future advances were so intermingled, that the promise with reference to them could not be severed so as to determine to how much of the past

and to how much of the future advances, the promise was to be applied. It was void as to the past advances, and the future advances being so connected, the promise was void altogether. The case of *Cooke* v. *Toombs* (*a*) was analogous to the present. There a contract for lands and chattels was entered into, and the question arose whether there was a sufficient part performance to take the case out of the Statute of Frauds, and it was held, that as there was not a sufficient part performance as to the land, the contract was void altogether. *Raikes* v. *Todd* (*b*), already cited, was an authority in point. Then as to the future advances, as there was no undertaking on the part of the plaintiffs, and there could be no binding undertaking on the part of the future members of the firm, the future advances could afford no consideration for the promise.

MAULE, J.—Suppose the defendant had said by the guarantee, if you will advance 1000*l.* to Fielding, I will pay both the old debt, and that new advance: can it be contended, that because the plaintiffs did not bind themselves to advance the money, but did advance it, that the defendant would not be liable? The only distinction between that case and the present is, that here the sum to be advanced is indefinite. The case is different from *Raikes* v. *Todd*, because there the defendant guaranteed to pay the money, at all events, whether fresh advances were made or not. The plaintiff might, within the terms of that guarantee, have brought his action at once; but here the plaintiffs must have advanced something. The defendant said there, whether you make fresh advances or not, I will pay you; but this guarantee is wholly conditional upon some amount being advanced, and I do not suppose that it will now be argued that we can enter into the question of adequacy of the consideration.

(*a*) 2 Anstr. 420.

(*b*) 8 A. & E. 846; S. C. 1 P. & D. 138.

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ERLE, J.—Advances must be made, and there is in the declaration an averment that they were made. Issue might be taken on the compliance with the consideration.

TINDAL, C. J.—The question would then be, whether the plaintiffs made advances ejusdem generis with those previously made, and bonâ fide in compliance with the guarantee?

PER CURIAM.

Judgment for the Plaintiffs.

COURT OF EXCHEQUER.

Easter Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

ASTON *v.* PERKES. *sc* 15 *M* & *W* 385. 1846.

In an action of trespass for breaking and entering the plaintiff's dwelling-house, and seizing and laying hold of the plaintiff, the defendant paid money into Court. The plaintiff replied, damages ultra, upon which issue was joined, and a verdict found for defendant. On motion for judgment non obstante veredicto, *Held*, that the plea was good, inasmuch as by certain statutes, justices, and officers of the excise and customs, are enabled to pay money into Court in actions for trespass to the person; and that the plea need not state the particular character which they fill.

TRESPASS for breaking and entering a certain dwelling-house and close of the plaintiff, and seizing and laying hold of the plaintiff, and ejecting and expelling him therefrom.

Plea. Payment of 25*l.* into Court.

Replication, damages ultra, upon which issue was joined, and a verdict found for the defendant.

Gray had obtained a rule nisi to enter judgment for the plaintiff non obstante veredicto, on the ground that the 21st section of the 3 & 4 Wm. 4, c. 42, which enables defendants to pay money into Court in personal actions, expressly excepts actions for assault and battery.

Whateley and *Unthank* shewed cause. The present motion is founded on the assumption that the 3 & 4 Wm. 4, c. 42, is the only statute under which money can be paid into Court. That, however, is not so. The 24 Geo. 2, c. 44, s. 2, enacts, "that it shall be lawful to and for such justice of the peace, at any time within one calendar month after such

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notice given as aforesaid, to tender amends to the party complaining, or to his or her agent or attorney; and in case the same is not accepted, to plead such tender in bar to any action to be brought against him grounded on such writ or process, together with the plea of not guilty, and any other plea, with the leave of the Court; and, if upon issue joined thereon the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant." The 34th section of the 3 & 4 Wm. 4, c. 53, enables any officer of customs to go on board any vessel within the limits of any ports of this kingdom, &c., "and also to search any person or persons either on board or who shall have landed from any vessel, provided such officer shall have good reason to suppose that such person or persons hath or have any uncustomed or prohibited goods secreted about his, her, or their person or persons." The 38th section enacts, "that it shall and may be lawful for any officer or officers of customs, or person acting under the direction of the commissioners of his Majesty's customs, having a writ of assistance under the seal of his Majesty's Court of Exchequer, to take a constable, headborough, or other public officer inhabiting near the place, and, in the day time, to enter into and search any house, shop, cellar, warehouse, room or other place, and, in case of resistance, to break open doors, chests, trunks, and other packages, there to seize and from thence to bring any uncustomed or prohibited goods," &c. The 105th section enables such officer to tender amends, and the 106th section provides, "that in case such officer or other person as aforesaid shall neglect to tender any amends, or shall have tendered insufficient amends before the action brought, it shall and may be lawful for him, by leave of the Court where such action shall be brought, at any time before the trial of the said action, to pay into Court such sum of money as he shall see fit; whereupon such proceedings, orders and judgments shall be had, made, and given in and by such Court as in other actions where the defendant is allowed to pay money into Court." Similar provisions will be found in the 8 & 9 Vict. c. 87, s. 120,

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and in the statutes relating to the excise, 7 & 8 Geo. 4, c. 53, s. 117; 3 & 4 Wm. 4, c. 53, s. 106. [*Parke*, B.—The question is, whether in such cases the plea ought not to state the character which the defendant fills?] It is submitted that it would be sufficient to pay the money into Court according to the form prescribed by the rule of Trinity Term, 1 Vict. Under the 24 Geo. 2, c. 44, money was paid into Court by rule of Court; and in order to obtain such rule, it was necessary for the defendant to go before a Judge and satisfy him that the defendant was a justice of the peace, and entitled to the protection of the act. This plea would have been good upon general demurrer, inasmuch as the above mentioned statutes enable persons filling a particular character to plead such a plea, and the Court would not look beyond the record; *Calvert* v. *Moggs* (*a*). [*Parke*, B.—The objection to the plea is, that it is a good confession but a bad avoidance.] It is merely an implied confession, which is insufficient to enable the Court to give judgment for the plaintiff non obstante veredicto. For that purpose there must be an express confession in terms, so as to be apparent on the record, that in point of fact a trespass was committed. [*Parke*, B.—The authorities are collected in *Collins* v. *Gwynne* (*b*).] In *Hobart*, 164 (*c*), it is said, "Now there is a great difference between a direct confession of the party by a bene et verum, &c., and a nient dedire, or a demurrer, that is between a direct confession of the party against himself, and an admittance by implication, or a verdict finding it, or the like, as in 2 Hen. 7, 16." Where money was paid into Court on a demand for unliquidated damages, and the plaintiff took it out, it was held that he thereby waived the irregularity, and could not afterwards have a verdict, unless he recovered more than the sum paid in; *Griffiths* v. *Williams* (*d*).

(*a*) 10 A. & E. 632; S. C. 2 P. & D. 543.
(*b*) 9 Bing. 544; S. C. 2 M. & Scott, 640.
(*c*) The *Commendam case*.
(*d*) 1 T. R. 710.

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Gray, in support of the rule. The plea confesses the cause of action, but does not avoid it. This case is distinguishable from *Griffiths* v. *Williams*, for there the money was paid into Court by order of a Judge, and the objection did not appear on the record. In the case of payment of money into Court by justices or excise officers, the plea should state the character which they fill. If it were otherwise, a fact material to render the defence good would be altogether withdrawn from the jury. In the precedent in 3 *Chit. Plead.* 974, 6*th ed.*, of a plea of tender of amends by a justice of the peace, the plea alleges the fact of the defendant being a justice, and that the trespass was committed by him in the execution of his office. So in the precedent of a plea of tender by officers of the excise and customs (*a*), it is distinctly alleged that the defendants were such officers.

Cur. adv. vult.

The judgment of the Court was delivered by

POLLOCK, C. B.—In Michaelmas Term last, Mr. *Gray* moved for judgment non obstante veredicto, in an action of trespass quare clausum fregit, in which the declaration stated the entry, and that the defendant seized and laid hold of the plaintiff and ejected him; and the defendant having paid 25*l.* into Court by leave of the Court, the plaintiff replied damages to a larger amount, on which issue was joined, and a verdict found for the defendant. Mr. *Gray* insisted that the plea contained a confession (as it certainly did) and a bad avoidance; because, under the statute 3 & 4 Wm. 4, c. 42, the Court or a Judge had no power to permit money to be paid into Court in an action for assault and battery as this is. Mr. *Whateley* and Mr. *Unthank* shewed cause in the present Term, and their argument was, that although the plea would not be sanctioned

(*a*) 3 Chit. Plead. 974, 6th ed.

by the 3 & 4 Wm. 4, c. 42; yet that there were cases in which persons filling a particular character had a power of pleading in this form to actions of battery; and, therefore, that the plea was not necessarily bad. The instances were those of justices and excise officers. The 24 Geo. 2, c. 44, s. 4, enables a justice (in an action for anything done in the execution of his office) by leave of the Court to pay into Court such sum as he shall think fit, "whereupon such proceedings, orders, and judgments shall be had, made, and given in and by such Court, as in other actions where the defendant is allowed to pay money into Court." The 3 & 4 Wm. 4, c. 53, s. 106, which received the royal assent fourteen days after the 3 & 4 Wm. 4, c. 42, gives a similar power to excise officers. The 8 & 9 Vict. c. 87, which was also cited, does not apply; for it did not receive the royal assent till the 4th of August, 1845, which must have been after the trial of this cause. At the time of passing the acts of the 24 Geo. 2, and 3 & 4 Wm. 4, c. 53, the mode of paying money into Court was by an order, striking the amount of the money paid out of the amount of damages, and preventing the plaintiff from recovering, unless he proved beyond the amount paid into Court. The consequence was, that the Court or Judge making the order not only exercised the discretion as to allowing the payment, but determined whether the defendant was a justice or officer, and whether he was acting in execution of his office in the matter which was complained of in the action. After the passing of the act of 3 & 4 Wm. 4, c. 53, the new rules were made by the Judges, and the money paid into Court must no doubt be paid according to the rules, whether by a justice or excise officer; and the question is, what form of plea is required by the new rules in such cases. The rule 17, is, that the payment shall be pleaded in all cases, and as near as may be, in the form set out, mutatis mutandis; which form is amended by rule in Trinity Term, 1 Vict. If it had been intended that in the special cases of justices and officers entitled to pay money into

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Court by different statutes, the character of the defendant should be stated in the plea, it is very reasonable to suppose that the rule would have provided for such a statement. It has not done so, all notice of the character of the defendant is omitted, and there are very strong reasons why it should be; for the effect would be to give to the plaintiff the power of taking issues on the fact of the defendant being such justice or officer, and also on the fact whether he was acting in the execution of his duty, and thus transferring to the jury the right to decide those questions of fact, which at the time of the passing of the 24 Geo. 2, c. 44, and 3 & 4 Wm. 4, c. 53, and the then prevailing practice were determinable, and conclusively determinable by the Court only or a Judge, subject to appeal to the Court. The object of the new rule was only to put the statement of payment of money into Court on the record, and so save the defendant the trouble and expense of proving the Judge's order. We all think that the true construction of the rule is, that the form is to be adopted in all cases of payment of money into Court in any action, without stating the character of the defendant, and that the provision that the plea is to be "as near as may be" in that form, and "mutatis mutandis," is only to authorize such alteration as may be necessary, in order to adopt the plea to the names of the parties, to the form of the action (*a*), to the sum paid, and the like. We therefore come to the conclusion that this plea is good, because, for anything that appears on the record, according to which alone we are to give judgment, it may have been pleaded by a justice or officer, entitled by statute and the new rules together, to such a plea.

Rule discharged.

(*a*) See *Lowe* v. *Steel and Another*, *post*, p. 662.

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JAMES and Another *v.* CRANE.

SC. 15 M&W. 379.

Where a cause was referred to a barrister to state a special case, and the case was stated after the death of the defendant, the Court refused to set it aside.

THIS case was referred, by order of nisi prius, to a barrister, who was to state a special case. The barrister was attended by the parties in October last. On the 10th of January the defendant died, and the special case was delivered on the 19th of February.

Chilton moved for a rule to shew cause why the special case should not be set aside, on the ground that it was stated after the death of the defendant. In *Watson on Awards* (*a*), it is laid down, that the death of one of the parties to a reference before award made is a revocation of the power of the arbitrator; and it is difficult to distinguish such a case in principle from the present.

POLLOCK, C. B.—There is no ground for the application. If this had been the case of a special verdict, and one of the parties had died before the verdict was prepared, that would have made no difference. There is a manifest distinction between this case and that of an award, for here the referee is put in the place of the Judge, to settle the points for the opinion of the Court.

PARKE, B.—I am of the same opinion. It must be presumed that the jury would have found the facts stated in the special case. Then the referee is a person appointed in the place of the Judge to settle the case, and if he had not been substituted, the Judge might have proceeded to settle the case after the death of the parties. The suit does not abate by the death of a party after verdict, and there seems to me no ground whatever for setting aside the special case.

ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

(*a*) Page 23, 2nd ed.

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sc. 15. M. & W. 380.

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In an action of debt, where money is paid into Court as to part of the debt only, the plea given by the rule of Trin. Term, 1 Vict. is insufficient; it should be so framed as to answer the damages as well as the debt.

4 Dow. 274

DEBT for goods sold, money paid, &c.

The defendants pleaded "as to the sum of 13*l.* 5*s.* 9*d.*, parcel of the debts in the declaration mentioned," payment of that sum into Court, in the form prescribed by the rule of Trinity Term, 1 Vict., alleging "that they never were indebted to the plaintiff to a greater amount than the said sum of 13*l.* 5*s.* 9*d.* in respect of the causes of action in the introductory part of this plea mentioned."

There were other pleas which went to the residue of the debts in the declaration.

The plaintiff accepted the sum paid in satisfaction of the debts in the introductory part of the above plea mentioned, and signed judgment for the damages in respect of the detention of that sum. He joined issue upon the other pleas, and delivered the issues, with an award of a writ of inquiry "as well to try," &c., "as to assess the damages which the plaintiff hath sustained on occasion of the detaining of the said sum of 13*l.* 5*s.* 9*d.*," &c., "parcel," &c.

A rule nisi having been obtained to set aside the judgment, and to strike out the entry made in the issue in relation thereto with costs:—

Cowling shewed cause (*a*). The judgment is regular. The plea affords no answer to the damages which the plaintiff has sustained by reason of the non-payment of the 13*l.* 5*s.* 9*d.*, which is admitted to be due. Upon that sum the plaintiff might have recovered interest by way of damages, and such part of this cause of action being unanswered, the proper course was to sign judgment. In 1 *Wms. Saund.* 28, n. 3, 6th ed., it is said, "if a plea begin only as an answer to part, and is in truth but an answer to part; or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by nil dicit, for if he demurs or pleads over, the whole action is discontinued." [*Pollock*, C. B.—The difficulty which I feel arises from the rule of Court which has the force of an act of Parliament.]

(*a*) In Trinity Term, 1845.

This plea does not purport to go to the whole cause of action; and consequently, if it were allowed, the plaintiff would be altogether deprived of interest; for he could not new assign; and if he brought another action for interest, the judgment in this action might be pleaded in bar; *Hitchin* v. *Campbell* (*a*); *Lord Bagot* v. *Williams* (*b*). [*Pollock*, C. B.—In what way ought the defendants to have pleaded?] They should have paid the moneyi n satisfaction of the debt and damages. [*Alderson*, B.—You should have brought assumpsit and not debt.] This inconvenience would follow, that in case of a judgment by default, there must be a writ of inquiry. The rule of Trinity Term, 1 Vict., does not order that in every case the plea shall follow the form there given, but directs that "when money is paid into Court, such payment shall be pleaded in all cases, and as near as may be, in the following form, mutatis mutandis." In this case the defendants should have altered the plea accordingly. Under the form of replication prescribed by the rule, the plaintiff has no alternative but to reply that the defendants owe him more, or that he accepts the sum paid into Court in satisfaction of the debt to which it is pleaded. With respect to the residue of his claim, the plaintiff is left to his remedy at common law. The plea should have been in a similar form to that of a plea of set-off, and should have answered both the debt and the damages sustained by reason of its detention. Before the new rule, when money was paid into Court, it only went in liquidation pro tanto of the debt and damages. *Kidd* v. *Walker* (*c*) decided, that where a defendant, sued upon a security carrying interest, pays money into Court sufficient to cover the principal, with interest down to the commencement of the action, but not to the time of paying in the money, the plaintiff may proceed, and a jury on the trial is bound to give him damages for the interest accruing between the commencement of the action and the payment into Court. The principle of that case is precisely

(*a*) 2 W. Bl. 827.

(*b*) 5 D. & R. 87; S. C. 3 B. & C. 235.

(*c*) 2 B. & Ad. 705; S. C. 1 Dowl. 331.

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applicable to the present. *Blackmore* v. *Flemyng* (*a*) shews that in an action of debt the plaintiff is entitled, as a matter of law, to some damages: if none were given, he could not have costs under the statute of Gloucester. [*Pollock*, C. B.—In *Bailey* v. *Sweeting* (*b*), this Court held a similar plea bad, for containing that for want of which you contend that this plea is bad.] The plaintiff only accepts the money in discharge of that claim in respect of which it is paid in, namely, the debt. The observations of *Holroyd*, J., in *Higgins* v. *Sargent* (*c*), do not apply to this case, but relate to the discharge of a debt before action brought. In *Henry* v. *Earl* (*d*), Lord *Abinger*, C. B., in delivering judgment says, "no doubt costs form part of the damages resulting from the detention of the debt, and if there is no answer as to those costs, the plaintiff may sign judgment for so much. Though the damages in debt are, in general, considered as nominal only, yet the jury may give substantial damages if they think fit." In *Bailey* v. *Sweeting*, the Court did not decide that the plea was bad, because the defendant had pleaded to the damages; but because he admitted that there was some damage to which he gave no answer.

Martin, in support of the rule. Both at common law and under the new rules, the plaintiff is irregular in signing judgment. The argument on the other side proceeds upon the assumption that in every case of a debt for goods sold and delivered, interest is due. In *Higgins* v. *Sargent* *Holroyd*, J., says, "I am of opinion upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now, in that action the defendant was summoned to render the debt, or shew cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action." In truth the damages are merely nominal, in order to enable the

(*a*) 7 T. R. 446.
(*b*) *Ante*, vol. 1, p. 653; S. C. 12 M. & W. 616.
(*c*) 2 B. & C 352.
(*d*) 8 M. & W. 233; S. C. 9 Dowl. 725.

plaintiff to obtain costs under the Statute of Gloucester. [*Alderson*, B.—If the doctrine contended for on the other side be true, nil debet was always a bad plea, because it did not cover the damages.] In an action of debt for rent, it is sufficient to plead that the rent was levied by distress; *Com. Dig.* tit. "*Pleader*," (2 W. 47) (2 V. 14); though the plaintiff sue as well in respect of the detention of the debt as for the debt itself. In *Wilde* v. *Clarkson* (*a*) it was decided, that a party sued on a bond of indemnity is entitled to have satisfaction entered on the record on payment of the penalty of the bond and costs of the action. In that case *Lord Lonsdale* v. *Church* (*b*) was relied on as an authority to shew, that in an action on a bond, damages may be recovered beyond the amount of the penalty, but Lord *Kenyon* says (*c*), "I cannot accede to the doctrine in the case cited by the plaintiff's counsel; according to that, an obligor who became bound in a penalty of 1000*l.*, conditioned to indemnify the obligee, may be called upon to pay 10,000*l.*, or any larger sum, however enormous. Suppose the plaintiff proceeds in this action, and no defence is made to it, the judgment would be for the penalty of the bond, and one shilling nominal damages for the detention of the debt." In a late case of *Branscombe* v. *Bridges* (*d*), the Court of Queen's Bench were inclined to think, that in an action on a bond the plaintiff was not entitled to nominal damages for the detention of the debt, and that in the case of *Hellen* v. *Ardley* (*e*), Lord *Tenterden* was wrong in allowing such damage. In *Bailey* v. *Sweeting*, *Parke*, B., says, "the Judges took the trouble to draw a statutory form, which answers in substance the demand." Secondly, under the new rules, the plaintiff is clearly irregular in signing judgment, for the rules expressly prescribe the course of proceeding. If the plaintiff have any independent ground of action for damages, a recovery in this suit would be no bar. In *Hitchin* v. *Campbell* (*f*), and *Lord*

(*a*) 6 T. R. 303.
(*b*) 2 T. R. 388.
(*c*) 6 T. R. 304.
(*d*) Trin. Term, 1844.
(*e*) 3 C. & P. 12.
(*f*) 2 W. Bl. 827.

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Bagot v. *Williams* (*a*), the parties were clearly concluded, as the second action was for the same cause as the first. The observations of Lord *Abinger* in *Henry* v. *Earl* (*b*), were altogether extrajudicial.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case was argued some time ago, and the question was, whether a plea in an action of debt was bad, or rather incomplete, which did not take notice of the damages claimed in the declaration beyond the debt. It must be conceded that the form of plea given by the rules is not accurate, as it omits to notice these damages expressly. In an action of debt, no doubt the plea must state that the defendant never was indebted to the plaintiff in a greater amount; but the question is, whether it must not also notice the damages for the detention of the debt. We think it must, in order to constitute an answer to the action, because it may happen that damages are a very important part of the plaintiff's claim: as for instance, in debt on a mortgage deed, where the principal and interest are to be paid on a given day, the interest after that day can only be recovered as damages, and that interest may equal or even exceed the debt; and as it is impossible to tell on the face of the record whether the damages are substantial or not, we think the plea ought to be framed so as to include a payment into Court on account of the damages, and the plea should be varied accordingly, in order to adapt it to the nature of the action. The rule, therefore, in this case, which is to set aside the judgment signed for the damages, should be discharged; but as the point is new, and the defendants have been misled by the deficiency in the form of the plea given by the new rules, it should be without costs, and the defendants may amend their plea on payment of the costs of the amendment only.

Rule accordingly.

(*a*) 5 D. & R. 87; S. C. 3 B. & C. 235.

(*b*) 8 M. & W. 233; S. C. 9 Dowl. 725.

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BANIN *v.* MARGARET JONES.

IN March, 1845, the present action was commenced against the defendant, who was then a widow. On the 18th of April, she married one Davies, and on the 30th of the same month an appearance was entered for her according to the statute. On the 31st of May, judgment was signed against her by the name of Margaret Jones, and thereupon a testatum ca. sa. issued under which she was taken in execution. A summons was taken out at Chambers to discharge the defendant out of custody upon affidavit that she had no separate property; and on the 19th of December, *Rolfe*, B., made an order accordingly.

Where a married woman is taken in execution on a judgment obtained in an action commenced against her when sole, the Court will not discharge her out of custody; although it appear that she has no separate property.

E. V. Williams had obtained a rule, calling on the defendant to shew cause why the order of *Rolfe*, B., should not be rescinded, and why the sheriff should not be directed to retake the defendant.

Gray shewed cause. If the judgment had been against the husband and wife, there could have been no doubt that the Court would have discharged the wife. The rule as to execution in such case is laid down in *Tidd's Pract.* 1026 (*a*), and recognised by the Court in *Sparkes* v. *Bell* (*b*). In an action against husband and wife, they may both be taken in execution, and when the wife is taken in execution, she shall not be discharged unless it appear that she has no separate property out of which the demand can be satisfied, or that there is fraud and collusion between the plaintiff and her husband to keep her in prison. That rule was acted upon by *Patteson*, J., in the case of *Hoad* v. *Matthews* (*c*). There is no substantial difference between the present case and that of a judgment against husband

(*a*) 9th ed.
(*b*) 8 B. & C. 1; S. C. 2 M. & R. 124.
(*c*) 2 Dowl. 149.

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and wife. The ground upon which the Court interferes is applicable to both, namely, that the wife has no means of acquiring property to satisfy the judgment. The marriage of the defendant did not abate the suit, neither could she have pleaded her coverture; *King* v. *Jones* (*a*). It will, perhaps, be said, that as there is no judgment against the husband, the plaintiff is without remedy; but it is competent for him to make the husband a party to the suit by scire facias. In the case of *Chalk* v. *Deacon* (*b*), the Court of Common Pleas considered that the discharge of the wife under circumstances like the present was a matter in the discretion of the Court. In *Cooper* v. *Hunchin* (*c*), the Court refused to discharge the wife: but there the application was not made, on the ground that she had no separate property; but on the ground that the execution against her was irregular. *Doyley* v. *White* (*d*) only decided that the sheriff was not liable to an action for false imprisonment for taking a married woman in execution on a judgment obtained against her when sole. In *Moses* v. *Richardson* (*e*), the Court said that the wife must be left to her writ of error. In *Evans* v. *Chester* (*f*), the affidavit in support of the wife's discharge did not state that she had no separate property.

E. V. Williams, in support of the rule. The point is entirely new, there being no authority to shew that the Court will discharge a married woman taken in execution upon a judgment obtained in an action against her when sole. The proceedings are in every respect regular: the judgment is against the wife alone, and the writ of execution issued in the only way in which the law allows it, namely, against her alone. It is conceded, that where

(*a*) 2 Ld. Raym. 1525; S. C. 2 Stra. 811.

(*b*) 6 Moore, 128.

(*c*) 4 East, 521; S. C. 1 Smith, 282.

(*d*) Cro. Jac. 323.

(*e*) 8 B. & C. 421.

(*f*) 6 Dowl. 140; S. C. 2 M. & W. 847.

the judgment is against husband and wife, and the execution issued against both, the practice has been to discharge the wife where she has no separate property. That practice, however, is founded upon no principle, but it is a stretch of the authority of the Court which it will be slow to extend without some stringent reason. Until the case of *Chalk* v. *Deacon*, in the year 1821, there is no decision that a married woman could be discharged by the authority of the Court; that being the foundation of the practice, it has by degrees become established; but it cannot apply to cases in which there is no judgment against the husband. The law says, that a party who has obtained a judgment against a married woman, may have his writ of execution against her; and it is difficult to see why the Court should interfere, unless upon the ground, that where the wife has no separate property, it is mere idle tyranny to keep her in prison. In the present case, it is by no means clear, that the plaintiff has a remedy against the husband by scire facias; for if the wife be taken in execution, that fact might be pleaded in bar. He also cited *King* v. *Jones*.

Cur. adv. vult.

The judgment of the Court was afterwards (*a*) delivered by

POLLOCK, C. B.—In this case, my Brother *Rolfe*, having made an order for discharging the defendant, a married woman, out of custody, she having been taken in execution on a ca. sa., a rule was obtained on behalf of the plaintiff, calling on the defendant to shew cause why the order should not be discharged and why the sheriff should not retake the defendant. The case was argued last Term, and there being no authority precisely in point, we took time to consider our judgment. The facts are very simple. The plaintiff brought an action against the defendant in March, 1845, when she was a widow. In April, 1845, she

(*a*) In Trinity Term.

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married a second husband, named Davies. The plaintiff took no notice of this but proceeded in the action, and on the 31st of May, signed judgment against the defendant by her former name of Margaret Jones, and on this judgment sued out a ca. sa. against her alone. It is admitted, that the defendant has no separate property, and the question is, whether my Brother *Rolfe*, under these circumstances, did right in ordering her to be discharged. The whole practice of discharging married women, who are in lawful custody on a ca. sa. is of very recent date, and certainly appears to rest on no principle whatever. The writ of ca. sa. is the right of the plaintiff as the result of his judgment, and it is admitted, that under such a writ, the sheriff is bound to take the party against whom the writ is directed, whether she be under coverture or not; he is bound to do so, not only where she is sued with her husband, but also where, as in this case, she has been sued alone as a feme sole and has married during the suit; *Doyley* v. *White* (*a*). Since, therefore, the plaintiff has a right to take the feme covert in execution, and to detain her in satisfaction of his debt, it would seem on principle to follow, that the Court cannot interfere to discharge her out of custody unless there be some special circumstances requiring the Court, in the exercise of its equitable jurisdiction, to interfere and prevent the plaintiff from availing himself of his legal right. Certainly in modern times, the Courts, when judgment has been recovered against a husband and wife, and both have been taken in execution, have assumed the right of discharging the wife out of custody, if she have no separate property, on the ground apparently that it is hard to detain in custody, a defendant, who cannot by law acquire property wherewith to satisfy the plaintiff. This, it must be admitted, is rather making the law than administering it. At the same time, the practice has prevailed so long in the case of a judgment against husband

(*a*) Cro. Jac. 323.

and wife, that in such a case, we should probably not feel ourselves warranted in deviating from the ordinary course; but in the case of a rightful judgment against a married woman alone, there is no decided case authorizing the Court in discharging her when she has been taken on a ca. sa., and there is certainly a distinction between that case and the case of a judgment against husband and wife. In the former case, the discharge of the wife deprives the plaintiff of all possible chance of recovering his debt; whereas in the latter, he still has the husband to whom he may resort. The distinction is not indeed at all satisfactory. There seems to be no more principle to warrant the Court in depriving the plaintiff of part of his legal right, than in depriving him of the whole: still it may be said, that in one case, the practical injustice is less than in the other, and therefore finding the practice established in the case of a judgment against husband and wife, we might not feel justified in refusing to act, in the case of a joint execution, on what must be considered as the established practice; yet seeing no principle to warrant us, and it being admitted that no case can be found in which a married woman has been discharged when she has been the sole defendant, and has been taken on a ca. sa., we do not feel warranted in discharging her in this case, and so altogether depriving the plaintiff of the fruits of his judgment. The consequence is, that the rule discharging my Brother *Rolfe's* order, and directing the sheriff to retake the defendant must be made absolute.

Rule absolute (*a*).

(*a*) See *Thorpe* v. *Argles*, *ante*, vol. 1, p. 831.

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S. C. 15 M. & W. 316

CREMER *v.* CHUCK.

When a verdict is taken at nisi prius by consent, subject to the certificate of an arbitrator, the certificate, when given, relates back to the time of the verdict; therefore where such certificate was given in Vacation, and several months after the return day of the distringas: *Held*, that the successful party might sign judgment immediately, and was not bound to wait until after the first four days of the ensuing Term.

THIS cause came on for trial at the Summer Assizes at Croydon, 1845, when a verdict was taken for the plaintiff subject to the award, or certificate of an arbitrator, so that the award were made or certificate given before the fourth day of the then next Michaelmas Term, with power for the arbitrator to enlarge the time as he should think fit. The time was enlarged accordingly, and on the 20th of March (which was several months after the return-day of the distringas juratores) the arbitrator certified in favour of the plaintiff for a smaller amount. Upon production of this certificate, the associate delivered the postea to the plaintiff's attorney, who signed final judgment on the 7th of April.

A rule had been obtained, calling on the plaintiff to shew cause why judgment should not be set aside for irregularity, on the ground that the plaintiff was not entitled to sign judgment until the expiration of the first four days of the Term after the certificate was given.

Martin and *Willes* shewed cause. In ordinary cases final judgment may be signed at any time after the expiration of four days from the return-day of the distringas; Reg. Gen. Hil. Term, 2 Wm. 4, r. 67; *Aymes* v. *Lettice* (*a*); *Mason* v. *Clarke* (*b*): and it is submitted that the practice is not affected by the circumstance of the verdict being entered in pursuance of an arbitrator's certificate. The object of a certificate would be defeated, unless the amended verdict could be entered on the record as if it had been the verdict of a jury. There is no case precisely in point, but analogy is in favour of the plaintiff. Thus it is the constant practice at Nisi Prius, to order speedy execution; although the

(*a*) 8 Dowl. 202; S. C. 6 M. & W. 216.
(*b*) 1 Dowl. 288; S. C. 1 C. & J. 411.

defendant may, within the four first days of the ensuing Term, move to set aside the verdict. In *Little* v. *Newton* (*a*), where a cause and all matters in difference were referred by articles of agreement, and the award directed the costs of the cause and award to be paid by the defendant, it was held, that the plaintiff was entitled to have those costs taxed, without waiting for the period during which the defendant would be at liberty to move to set aside the award. Reference is there made to *Hobdell* v. *Miller* (*b*), in which the Court intimated an opinion at variance with the case of *Little* v. *Newton*; but *Manning*, Serjt., in his note, p. 979, observes, that "neither of those cases was founded on the statute 9 & 10 Wm. 3, c. 15, and where the reference is under the general authority of the Court at common law, there is no time absolutely fixed for moving to set aside the award, though it is usually required that the application be made within the statutable period." And in another note, p. 980, he says, "it would be a novel objection to the issuing of a fieri facias on a judgment that the twenty years allowed by 10 & 11 Wm. 3, c. 14, for bringing a writ of error upon that judgment, had not expired." The present point is said to have been decided by *Parke*, B., at Chambers.

[*Atherton*, amicus curiæ, mentioned a case which was referred at the summer assizes, and in Michaelmas Vacation, the arbitrator made his award. The plaintiff proceeded to tax his costs, when it was objected that the taxation was premature, as the defendant might, in the ensuing Hilary Term, move to set aside the award. The matter came before *Parke*, B., at Chambers, who said that the right to move to set aside the award, did not prevent the plaintiff from taxing his costs in the mean time, and that he would not interfere, unless a case of bad faith could be made out.]

(*a*) 1 M. & G. 976; S. C. 2 Scott, N. R. 159.
(*b*) 2 Scott, N. R. 163.

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Jervis, in support of the rule. The order of reference having enabled the arbitrator to enlarge the period for delivering his certificate, has conferred on him by implication all the consequences of that power; so that the verdict is not in effect given, until it is entered up according to the certificate. Suppose a jury desired a view, and counsel consented to postpone the cause for that purpose until the next assizes, the judgment could not be entered up until the usual period after the verdict was given. Or, suppose the assizes extended over part of a Term, could the plaintiff sign judgment immediately after the verdict, and so deprive the defendant of his four days to move. The question is not affected by the return-day of the distringas; for a trial might be regular, although it took place after the time for the return of the distringas had expired; *Cheetham* v. *Sturtevant* (*a*). *Allenby* v. *Proudlock* (*b*), decided that an award made in pursuance of an order of nisi prius may be objected to at any time before the end of the Term next after publication. In *Little* v. *Newton* (*c*), *Maule*, J., says, "How can the plaintiff have costs taxed before it is certain that he can sustain the award?"

POLLOCK, C. B.—The rule must be discharged. The question is simply this, whether in cases of this nature, the verdict is to be considered as delivered, when it is in fact pronounced by the jury at nisi prius, but subject to alteration by the arbitrator's certificate; or, whether it is to be considered as not delivered until the moment when the arbitrator sends in his certificate. If we examine the question by any test which can be applied to it, it is perfectly clear that the verdict exists from the time when it is taken from the mouth of the foreman of the jury. It is true, that it is delivered subject to future alteration; but the alteration when made relates back for all purposes to the time when the verdict was delivered. If this were

(*a*) 12 M. & W. 515; S. C. *ante*, vol. 1, p. 631.

(*b*) 4 Dowl. 54.

(*c*) 2 Scott, N. R. 159; S. C. 1 M. & G. 976.

not so, and if the jury were to be considered as giving their verdict at some time subsequent to the trial, the plaintiff might in the mean time elect to be nonsuited; whereas it is quite clear, that if the verdict is to be considered as taken at the trial, he could not afterwards say, "I will be nonsuited and thus stop the arbitrator from giving his certificate." There is no test by which we can come to any other conclusion than that in point of form the verdict is given when the jury deliver it at nisi prius, and why should we hold that it is not so in reality? There is always a Judge sitting who can prevent any injury from being done, and besides when persons enter into these arrangements, they must be understood to do so with reference to that which is a reasonable construction of them. I therefore think that the verdict must be considered as delivered when it is pronounced by the jury, and that what took place afterwards was a mere completion of it.

ROLFE, B.—I am of the same opinion, and for the same reasons. When parties agree that the jury shall give their verdict for a certain amount, liable to be altered generally, and not at any particular distance of time, and the arbitrator says that the verdict ought to be altered, it is to be considered as if originally given for the sum he names. Suppose the arbitrator had been of opinion that the amount of damages for which the verdict was taken was the correct one, then the verdict would have stood as pronounced by the jury. If, as suggested, the construction impose any hardship on the defendant, by depriving him of his four days to move to set aside the certificate, the answer is, that the parties have agreed that the arbitrator should certify within a certain time, and not at any particular moment; and if there be any misconduct, the remedy has been pointed out by my Lord.

PLATT, B., concurred.

Rule discharged.

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5 C. 15 M W. 435.

O'BRIEN *v.* CLEMENT.

To an action for libel in a newspaper, the defendant cannot plead not guilty to the whole declaration, together with a plea of apology and payment of money into Court, as to part, under the 6 & 7 Vict. c. 96.

THE declaration in this case contained a count for a libel published in a newspaper called "Bell's Life in London." A summons was taken out at Chambers for leave to plead several matters, namely, first, to the whole declaration not guilty; secondly, to part of the libel a justification; and thirdly, to part of the libel, a special plea of apology and tender of amends, under the 6 & 7 Vict. c. 96, s. 2, which enacts, "that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall upon filing such plea be at liberty to pay into Court a sum of money by way of amends for the injury sustained by the publication of such libel; and such payment into Court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into Court under an act passed in the fourth year of his late Majesty, intituled, 'An Act for the further amendment of the law, and the better advancement of justice;' and that to such plea to such action it shall be

competent to the plaintiff to reply generally denying the whole of the plea." *Platt*, B., having made the order required,

Lush obtained a rule nisi to amend the order of *Platt*, B., and the rule of Court drawn up thereon, on the ground that the third plea could not be pleaded together with a plea of not guilty.

Jervis and *C. Clark* shewed cause. The defendant is entitled to plead these pleas. The 6 & 7 Vict. c. 96, is cumulative, and gives a new form of plea, which, except for the statute, would be bad, as it denies malice, and so in effect amounts to not guilty. [*Parke*, B.—A defendant cannot plead not guilty and pay money into Court in respect of the same trespasses.] In trespass the act alone is regarded, but in an action of libel the act and intention must be considered together. [*Pollock*, C. B.—Suppose the defendant should succeed on the plea of "not guilty," how is the judgment to be entered, for if he were not guilty, he ought not to have paid money into Court? *Parke*, B.—The payment into Court is certainly an admission of a cause of action. The statute extends the power of paying money into Court to actions of libel, but only to certain special cases; and in order to make the plea good, it must appear that the libel is one of those special cases. The substance of the plea is this, "I admit that I am wrong, but I pay money into Court, which I say is a satisfaction:" but in order to justify the defendant in doing so, he must shew that the libel was published without actual malice, and without gross negligence. In truth it is nothing more than a special plea of payment of money into Court.] Payment of money into Court under the statute differs from a payment into Court under the 3 & 4 Wm. 4, c. 42, s. 21, for in those cases the right of action is complete on proof of some act done, but in libel the jury must be satisfied that it was published with a malicious intention. [*Pollock*,

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C. B.—That is not so. If you publish of another that which reflects on his character, it is a libel, whatever your intention may be. *Parke*, B.—In actions against justices of the peace they may plead not guilty, and a tender of amends; but in that case, if the plaintiff refuse the sum offered by way of amends, he has no remedy for it afterwards.]

Lush was not called upon to support the rule.

PER CURIAM (*a*).—The pleas ought not to be allowed, and the rule must be absolute, to amend the order and rule to plead several matters, by restricting the general issue to that part of the declaration to which the plea of payment of money into Court does not apply.

Rule absolute accordingly.

(*a*) *Pollock*, C. B., *Parke*, B., *Platt*, B.

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8 C. 15. 2 W. W. 191.

BROWN *v.* JONES and Others.

In trespass for false imprisonment, the defendant justified under a ca. sa. issued on a judgment obtained against the plaintiff. Replication, that the judgment was signed on a warrant of attorney, and that the judgment and ca. sa. were set aside by a Judge's order, which was afterwards made a rule of Court; on the ground that the warrant of attorney was never delivered as a complete authority to do or suffer any of the acts therein specified, but as an escrow to be kept by the plaintiff in his own possession till a certain event should happen: that the defendant, by improper contrivance, obtained and kept possession of it, without the plaintiff's consent: *Held*, first, that the replication was good, as it sufficiently appeared that the judgment was set aside, not on the ground of its being erroneous, but on the ground of irregularity, or want of good faith. Secondly, that it was not necessary to allege that the order was made a rule of Court before the commencement of the suit. Thirdly, that nul tiel record was not the proper replication to such plea.

TRESPASS for assaulting and imprisoning the plaintiff. Plea: that defendant Jones, in the Court of Queen's Bench, by the consideration and judgment of the Court, recovered against the plaintiff the sum of 150*l.* for damages and costs, whereof the plaintiff was convicted, prout patet per recordum: that the other defendants, as attorneys for Jones, issued a non omittas ca. sa. against the plaintiff,

directed to the sheriff of Bristol, by virtue of which the sheriff arrested the plaintiff: quæ sunt eadem, &c.

Replication: that the judgment was not a judgment signed in any action, but under colour of a document, purporting to be a warrant of attorney: that after the issuing of the non omittas ca. sa., and before the commencement of this suit, by a certain order of *Platt*, B., it was ordered that the judgment in the plea mentioned, and the said writ of ca. sa. should be set aside, and the same were set aside, which said order was afterwards, to wit, on the 9th day of October in the year aforesaid, ordered to be made, and the same was made, a rule of Court: that the judgment and ca. sa. were set aside on the ground that the document, although purporting to be a warrant of attorney, was never delivered to the attorneys as a complete authority to them to do or suffer any of the acts therein specified, but was merely delivered by the plaintiff as an escrow, to take effect in a certain event, which event had never happened, and was to be kept by the plaintiff in his own possession till such event should happen: that the defendant, by an improper contrivance, obtained and kept possession of it, without the consent and against the will of the plaintiff: and that the said judgment was signed under colour of the said document, and the writ of ca. sa. issued on such judgment, without the consent of the plaintiff.

Special demurrer, assigning for causes (amongst others) that it appears in and by the said replication, that there was no valid or sufficient ground for setting aside the said judgment: also that it does not appear in or by the said replication that the said order for setting aside the said judgment was made a rule of Court before the commencement of the suit.

Pearson, in support of the demurrer. First, it appears on the face of the replication that the learned Judge had no authority to set aside the judgment. It is alleged that the warrant of attorney was delivered as an escrow, whereas

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it is clear that it could not have been, inasmuch as it was kept in the possession of the plaintiff himself; *Com. Dig.* tit. "*Fait.*" (A 3.) The replication is inconsistent and repugnant, and discloses no valid ground for setting aside the judgment. If it had merely stated that the judgment was set aside for irregularity, that would have been sufficient; but as it proceeds to allege the reasons for setting it aside, and they prove to be insufficient, the order cannot be supported. Where an award is made in general terms, the Court will not inquire into the grounds of the arbitrator's finding; but if he state on the face of his award facts which shew that he has mistaken the law, the award will be bad. [*Alderson*, B.—In *Prentice* v. *Harrison* (*a*), the Court held a similar replication bad, for not alleging that it was set aside for irregularity; inasmuch as it might have been set aside as erroneous, in which case the defendant would not have been liable. But in this case such a state of things cannot be suggested, for the Court see that the ground of setting it aside must either have been irregularity or want of good faith. *Pollock*, C. B.—The learned Judge seems to have set aside the judgment because he thought it was signed against good faith, and contrary to the agreement of the parties.] Secondly, the replication is bad, in omitting to state that the order for setting aside the judgment was made a rule of Court before the commencement of the suit; *Tucker* v. *Webster* (*b*). That averment is material and traversable, and was introduced in *Prentice* v. *Harrison*, and *Codrington* v. *Lloyd* (*c*). [*Alderson*, B.—There is no necessity for it: it is not like where you seek to bring a party into contempt. The order of the Judge operates on the officer of the Court, not on the party.] Thirdly, the plaintiff ought to have replied nul tiel record. The defendant justifies under matter of record, which, if denied, should be tried by the record.

(*a*) 1 D. & M. 50; S. C. 4 Q. B. 852.

(*b*) 1 Dowl. 960, N. S.; S. C. 10 M. & W. 371.

(*c*) 8 A. & E. 449; S. C. 3 N. & P. 442.

Gray, contrà. There appears on the face of the replication sufficient ground for setting aside the judgment: it had been clearly obtained against good faith. In *Prentice* v. *Harrison* the replication did not state any ground, and it was held insufficient, because the judgment might have been erroneous and not irregular. That cannot apply here, as the particular ground is fully stated; *Rankin* v. *De Medina* (*a*). Secondly, it was not necessary to state that the Judge's order was made a rule of Court. Under the 11 Geo. 4 & 1 Wm. 4, c. 70, and 1 & 2 Vict. c. 45, a Judge at Chambers has a common jurisdiction over matters pending in any of the Courts. The order when made, was equally valid and effectual, as if made by the Court. If it were not so, a party might be detained in prison during the whole period of Vacation. Thirdly, the objection that the plaintiff ought to have replied nul tiel record, is only ground of special demurrer, and is not pointed out. However, it is sufficient to shew that the judgment was set aside. [*Alderson*, B.—If the judgment were set aside by consent, on the terms of no action being brought, that would not appear on the issue of nul tiel record. *Pollock*, C. B.—There are certainly cases in which the real question could not be tried on nul tiel record.]

PER CURIAM.—There must be judgment for the plaintiff (*b*).

(*a*) 1 C. B. 183; S. C. *ante*, vol. 2, p. 813.
(*b*) Decided in Hilary Term.

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Jc 15 Jur W. 304 RAWSTONE and Others *v.* GANDELL and Another.

In an action by the provisional committee of a railway company, the Court will not set aside a plea of release puis darrein continuance by one of the plaintiffs, if the releasor has any interest in the concern, however small; unless a clear case of fraud be made out.

4 Dr L 167.

CROMPTON moved for a rule to shew cause why a plea of release, pleaded puis darrein continuance, should not be set aside. The plaintiffs were the provisional committee of a joint stock company, called "The Liverpool, Preston, and North Union Junction Railway, with Extension to Blackburn, and Branches to Southport and Wigan," which had been registered under the 7 & 8 Vict. c. 110, and the action was brought against the defendants, who were engineers, for a breach of contract in not surveying the line, and furnishing sections and plans, in time to deposit the same with the clerk of the peace for the county of Lancaster, and at the office of the railway department of the Board of Trade, on the 30th of November, 1845, as required by the Standing Orders of Parliament. The writ was sued out in January, 1846, and, issue having been joined, the cause was entered for trial at the Spring Assizes for Liverpool on the 21st of March. On the evening of the 20th of March, the defendants' attorney delivered a plea, puis darrein continuance, of a joint release which had been executed the day before, by James Duncan and Cornelius Randall, two of the plaintiffs. It is submitted, that this release was given in fraud of the other plaintiffs, as appears from the facts disclosed by the affidavits: That the failure in depositing the sections and plans on the 30th of November having taken place, a meeting of the shareholders was called on the 21st of January, at which it was resolved, that the present proceedings should be instituted against the defendants, and that the resolution was communicated to all the original shareholders, and also to the releasors; it was then further resolved, that all persons holding shares, who were desirous of giving them up, should receive one guinea on account of the deposit on each share: that Duncan, one of the parties to the release, never took any

active part in the management of the company, and had been nominated on the provisional committee through the influence and instrumentality of the defendants, with whom he was on terms of intimate friendship: that two hundred shares were allotted to him, on which he paid a deposit; and of these one hundred and fifty had been presented for the return of the guinea: that shortly after the commencement of this suit, Duncan and another of the plaintiffs, together with two other persons, filed a bill in Chancery against all the rest of the plaintiffs, in order to have the accounts of the company taken under the authority of the Court, and to restrain the present action at law. The bill was filed by Messrs. Westmacott, the defendants' attorneys, who also commenced a cross-action against the company for the recovery of an alleged claim of the defendants: that Randall, the other party to the release, had, with some of the other plaintiffs, been appointed on the executive committee, which was selected from the provisional committee; but had never taken any active part in the management of the company: that, in pursuance of the above-mentioned resolution, Randall had received back one guinea for every share which had been allotted to him; and in February, 1846, executed a deed by which, in consideration of that repayment, he did 'release and for ever quit claim unto the provisional committee of the company all and all manner of actions, suits, reckonings, claims, and demands, both at law and in equity, which he could, should, or might have against the said committee, by reason or on account of the said projected undertaking, or any transaction, matter, or thing, in anywise relating to the same, but subject to a rateable participation in any surplus fund.' Under these circumstances there is a sufficient case to induce the Court to interfere. The question is of great importance, for if this plea be allowed, any one member of the provisional committee of a railway company will have it in his power at any time to extinguish the rights of the

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shareholders by executing a release. [*Parke*, B.—We cannot interfere to prevent the defendants from pleading the release, unless you make out a clear case of fraud. If you can shew that the parties executing the release had no interest whatever in the concern, but were mere trustees for the other plaintiffs, it would do; but however few the shares which they hold in the company, so long as they have *some* interest, they may execute a release.] In the case of *Phillips* v. *Claggett* (*a*), *Parke*, B., says, "Perhaps it may not be correct to say (and in that I agree with the Solicitor General), that in all cases in which a party has an interest he may release—that is not perhaps correct—it is correct to say, that if he has parted with all interest, in that case he cannot release." [*Pollock*, C. B.—What my brother *Parke* meant appears from the next passage, "One of the cases cited by the Solicitor General was a case where the partner agreed with his co-partner that the latter should receive all the debts due to the co-partnership, and pay the debts of the co-partnership: in such a case he has disposed of his right to release the debts, although he has an interest in the ultimate surplus. I quite agree that where a person, under such circumstances, executes a release to a party cognizant of the situation in which he stands, that is a case in which a Court of equity would interfere, and it is a case in which this Court, in the exercise of its equitable jurisdiction, would interfere to prevent the defendant from pleading the release."] The facts shew a case of fraud, and that the release was merely colourable. Duncan has parted with all his interest except a small portion, which he evidently retains for the purpose of assisting the defendants. Randall has parted with all his interest, and as the release is pleaded as the joint act of the two, the fraud of one vitiates the whole. [*Pollock*, C. B.—You must not confound fraud with im-

(*a*) 11 M. & W. 95; S. C. 2 Dowl. 1004, N. S.

propriety of conduct. It may be a very wrong thing to execute a release under circumstances like the present—it may be an act which an honest man would not do, and one for which he may be responsible to another tribunal; but if there be the smallest scintilla of right or real interest upon which the release may operate in law, we cannot interfere. *Parke*, B.—You are bound to shew that the release was a fraud on the other plaintiffs; that has not been done, and your remedy is by bill in equity against Duncan.]

ROLFE, B., and PLATT, B., concurred.

Rule refused.

The ATTORNEY GENERAL *v.* HALLETT.

SC. 15 Jur. 97.

An action of trespass quare clausum fregit having been brought in the Court of Common Pleas, the defendant pleaded that the locus in quo was part of a forest belonging to the Crown, and that he, as servant of the Crown, committed the alleged trespass. The replication put in issue the title of the Crown: *Held*, that after notice to the plaintiff, the cause might be removed into this Court by rule absolute in the first instance, upon the mere statement of the Attorney General (without affidavit) that the interest of the Crown came in question. In such a case two days' notice of the motion is sufficient.

THE ATTORNEY GENERAL moved on behalf of the Crown, for a rule absolute, to remove into the Office of Pleas of this Court, an action of *Hallett* v. *Vigne*, which had been commenced in the Court of Common Pleas. No affidavit was produced, but the Attorney General informed the Court, that an information for intrusion had been filed against Hallett for an encroachment upon Waltham Forest, and that the case of *Hallett* v. *Vigne* was an action for trespasses, alleged to have been committed by Vigne in abating that encroachment. The declaration was in the ordinary form of trespass quare clausum fregit, and the defendant pleaded (amongst other pleas), first, that the Chief Justice in Eyre granted to the defendant a license to hunt, &c. in the Forest of Waltham; that the locus in quo was within the forest, and that certain fences set up by the plaintiff interfered with the defendant's right; wherefore the defendant entered and removed the fences. The

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second plea alleged, that the locus in quo was the soil and freehold of her Majesty, and that the defendant, as the servant of her Majesty, entered and removed the fences. The fourth plea alleged, that the locus in quo was within the limits of the forest of Waltham, and that her Majesty was seised in fee, in right of her Crown, of, and in the forest of Waltham; that the locus in quo being wrongfully enclosed and fenced in, the defendant, as the servant of her Majesty, entered and pulled down the fences. The replication to the second and fourth pleas put in issue the title of the Crown. The defendant was under terms of pleading issuably, and taking short notice of trial for the next assizes. Under these circumstances, the Attorney General submitted, that he was entitled to a rule absolute to remove the cause into this Court as a matter of right, without any terms being imposed, upon his suggestion on the part of the Crown, that the interest of the Crown was in issue.

Two days' notice of the motion having been given to the plaintiff,

Montagu Chambers and *Willes* opposed the application. This is not a case to which the prerogative of the Crown applies. It is applicable only to cases of ejectment in respect of the lands of the Crown, or where an action is brought against an officer of the Crown, acting in the execution of his duty as a revenue or excise officer. Here the Queen's title or profit is not so directly in issue as to warrant the interference of the Court. The action is an ordinary one of trespass quare clausum fregit, between subject and subject, and does not in any way relate to the revenue of the Crown. If, indeed, the effect of this proceeding would be to eject the Crown, no doubt this Court would exercise its equitable jurisdiction (conceding that it still remains in matters of revenue) and grant an injunction to stay the proceedings. But there is no precedent for removing into this Court an action between two subjects,

merely because the title of the Crown comes collaterally in issue. Besides, this Court has no peculiar jurisdiction over matters relating to the title of the Crown to land, though it is otherwise with respect to matters of revenue. [*Pollock*, C. B.—The Court can grant a trial at bar without affidavit, upon the mere statement of the Attorney General, that the Crown is interested. A motion to stay proceedings is not a prerogative application; there must be a rule to shew cause, but a motion to remove proceedings is different: that is a prerogative application which the Court is bound to grant upon the suggestion of the Attorney General, that a question is raised which affects the title or revenue of the Crown.] *The Attorney General* v. *Kingston* (*a*), is an authority to shew that there should be a rule to shew cause. It is true that a two days' notice was given of the intended application, but that is insufficient; it should have been, at least, a four days' notice. The very object of notice, is to enable the party to come prepared to meet the application, and it is submitted, that a two days' notice is not a reasonable time for that purpose. [*Pollock*, C. B.—There is certainly some question as to whether the notice should be a two days' notice or a four days' notice. On referring to my Brother *Manning's* book (*b*), I find it thus laid down: "The rule is absolute, in the first instance, but four days' notice of the intended application is given." The authority, however, which is there referred to, is an anonymous case in *Anstruther*, p. 205, where all that is said is "upon notice," without mentioning any time. The Queen's Remembrancer certifies to us, that the practice is two days' notice, that is one clear day.] Assuming the notice to be sufficient, the question is, whether the prerogative of the Crown applies to a case like the present; and it is submitted that there is no general prerogative in the Crown to remove a cause between subject and subject, whenever the title of the Crown happens to come incidentally in

(*a*) 8 M. & W. 163; S. C. 1 Dowl. 358, N. S.
(*b*) *Manning's Exch. Pract.* p. 190, 2nd ed.

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issue. It would be a great hardship, if a party, who brought an action for breaking and entering his close, without being aware that the defendant claimed any title or authority from the Crown, were to be told, perhaps, at the point of trial, that some question might arise affecting the title of the Crown, and that he must, therefore, commence proceedings de novo in the Court of Exchequer. [*Pollock*, C. B.—A plaintiff has a right to bring his action in any Court he pleases, but as soon as the Crown, in point of fact, asserts its title, and interposes to make itself a party to the cause, the case assumes a different aspect, and the Crown has a right to have the cause tried in the Court of Exchequer.] In a case like the present, the only prerogative of the Crown is to have a trial at the bar of the Court in which the action is depending, and where the Attorney General may watch the proceedings on the part of the Crown. It is said, that the title of the Crown is in issue, but that arises from the defendant's mode of pleading, which compelled the plaintiff to traverse the title as alleged. [*Parke*, B.—The case of *Lamb* v. *Gunman* (*a*), is an authority to shew that the practice has been to remove similar actions. That was an action of trespass, brought in the Court of Queen's Bench, for seizing a quantity of wine. The defendant justified, as servant to the Duke of Cleveland, the taking of two tuns of wine, for the duty of prisage under a grant of King Charles the Second to the duke's father; and that cause was removed into this Court. There is also a case in *Hardres's Reports* (*b*), where one "Hammond was outlawed at the suit of another person, and lands in his possession were extended; a third person that claimed a title to those lands, brought an action of trespass and ejectment for them; and pleaded to the inquisition, and an injunction was prayed for the King to stay proceedings at law, and it was denied, because although a person outlawed cannot after extent prevent or avoid the King's title by any alienation, as appears by the 11 Hen. 7, yet the

(*a*) Parker, 143. (*b*) Page 176.

outlawry gives no such privilege to the possession of a disseisor, but that the disseisee may enter and bring his ejectment; for by the outlawry the King has a title only to the profits, and no interest in the land. But it was ordered, that the plea to the inquisition should be tried first, and that the ejectment should be brought in this Court, because the King's revenue was concerned."] In those cases, questions were raised directly affecting the King's revenue. In *Lamb* v. *Gunman*, the defendant was a revenue officer, and the action was brought against him for seizing certain wines for duties due to the Crown, consequently the title of the Crown to the wine came directly in issue. In *Hammond's case* (*a*), there had been judgment of outlawry, and it having been found, by inquest taken thereon, that certain lands belonged to the outlaw, a third party, who claimed title to the lands, came in and traversed the inquisition; so that in that case also, the traverse and result of the trial directly affected the interest of the Crown. In the present case it is otherwise, for a verdict and judgment for the plaintiff would not bind the Crown, who might, nevertheless, try its title in another proceeding. [*Alderson*, B.—That is the question. The proceeding here is in the nature of an injunction. Lord Chief Baron *Eyre* treats it as a proceeding in equity.] In the case of an ejectment it is so, because that action cannot be maintained in respect of land in possession of the Crown; but in the absence of authority the Court will not extend the prerogative to a case like the present, where the real question is not whether the locus in quo is the soil and freehold of the Crown, but whether the limits of the forest extend over the land where the fences were placed. [*Alderson*, B.—The issue on the fourth plea directly brings in question the title of the Crown. If there be any one issue upon which the Crown may interpose, that is enough to warrant an application to have the cause tried in this Court.] The defendant does not justify as an officer or servant of the

(*a*) Hardr. 176.

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Crown, but merely as a party acting under a forest license. The title of the Crown to the forest is admitted by the pleadings, and the only question is whether the locus in quo is within the bounds of the forest. In the case of *Cawthorne* v. *Campbell* (*a*), Chief Baron *Eyre* states the prerogative to exist "where the matter of suits in another Court touches the profit of the King," and he says that "then, upon the prayer of the Attorney General, the action is to be removed;" and the case of *Bishop* v. *Warner* (*b*), which has been cited and relied upon, from the particular circumstances of this suit, as a case in point against the application, proves the general principle contended for; for the Court agreed there that had the fine immediately concerned the King's revenue, the action should have been removed. In the case of *Lamb* v. *Gunman* (*c*), the action was removed. That was an action between the Duke of Cleveland's bailiff and some other persons of the town of Rye, upon a demand of prisage of wine, and there was an issue joined upon this question, whether the town of Rye were entitled by charter to be exempted from this claim of prisage. The King had a reversionary interest in the prisage, because it was granted to the Duke of Cleveland in tail, and in respect of this interest it was held that the King had a right to desire that that cause might be removed into the Court of Exchequer, and the case was accordingly removed. [*Parke*, B.—It seems to me impossible to distinguish that case from the present.] There, the question being in respect of a right to prisage of wine, was one which directly and immediately affected the King's revenue. [*Parke*, B.—Surely a question as to whether particular land is within the forest of Waltham is a question touching the Queen's profit. As regards revenue it is of great importance whether the forest extends over one acre or three thousand, equally as much as the question whether the right to prisage of wine, which extended over the greater part of the kingdom, extended to Rye also.] The distinction is, that the prisage of wine is purely a matter of revenue, and in no way re-

(*a*) 1 Anst. 205, n. (*b*) Hardr. 193. (*c*) Parker, 143.

lating to land. Besides, in that case the defendant justified under a person who was entitled to prisage at the time: here the defendant justifies without any authority at all. [*Alderson*, B.—Lord *Coke*, in the *Fourth Institute*, c. 11, p. 112, speaking of the profit of the King, says, "This profit is either immediate or mediate: immediate as of lands, rents, franchises, hereditaments, debts, duties, accounts, goods, chattels, and other profits and benefits whatsoever due to the King; mediate, as first the privilege of the officers and ministers of the Court: for two things do principally support the jurisdiction of a Court, namely, the just preservation of the dignity of it, and the due attendance of the officers and ministers of the same to sue and be sued in this Court." Therefore the only difference between the privilege of the officer and the profit of the King is that the one is a mediate and the other an immediate profit.] In the present case the defendant does not justify as an officer of the Crown. [*Alderson*, B.—The rule is that all questions touching the profit of the Crown are to be tried in this Court. Now, here the question is whether certain land is within the limits of the forest of Waltham. Can any one doubt that that is a matter touching the profit of the Crown? In the case of an action against an officer, the matter, though in dispute in another Court, is brought into this Court; because it is one of the matters touching the profit of the Crown; namely, the due support and sustentation of its officers. According to Lord *Coke*, the cases of officers are cases of the profit of the Crown. It is impossible to distinguish those cases from the present. *Parke*, B.—The Duke of Cleveland's case is precisely in point; because there the defendant was the officer of the Duke of Cleveland, not of the Crown.] That case is referred to in *Bac. Abr.* tit. "*Prerogative*," (E. 7) (*a*), where all the authorities bearing on the subject are collected. It is there said that, "Where the King's revenue is concerned in the event of a cause, it shall be removed from any other Court where the action is brought into the

(*a*) 7th ed., by Gwillim and Dodd.

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Office of Pleas of the Exchequer." Then *Lamb* v. *Gunman* is thus stated, "That in an action between the Duke of Cleveland's bailiff and some other persons of the town of Rye, upon a demand of prisage of wine, an issue was joined upon this question, whether the town of Rye was entitled, by charter, to be exempted from this claim of prisage. The King had a reversionary interest in this prisage, because it was granted to the Duke of Cleveland in tail; and in respect of this interest it was holden, that the King had a right to desire that the cause might be removed into the Exchequer, and the cause was accordingly removed." It will be found that all the cases there cited as authorities for the above position, were actions directly and immediately affecting the King's ordinary revenue, in the shape of monies, duties, or customs. If, however, the Court should interfere in the present case, the question will be upon what terms should the action be removed. According to the case, in *Anstruther* (*a*), the rule should call on the defendant to appear and accept a declaration, and put the plaintiff in the same position in the Office of Pleas of this Court as he was in the other Court. [*The Attorney General* stated that notice was given to the plaintiff that the motion would be made on behalf of her Majesty, and also of the defendant; and that he appeared for the defendant.] [*Parke*, B.—That saves the necessity of discussing whether the defendant ought to be a party to the rule or not.] It will be necessary for the plaintiff to abandon his proceedings in the Court of Common Pleas, and commence de novo by issuing a new writ of summons in this Court. The rule therefore, if granted, ought to be more special in its terms than when the proceedings were under the old process. [*The Attorney General* objected to any terms being engrafted on the rule; but undertook, if the Court would state what the practice was, that it should be pursued.] [*Parke*, B.—A new writ must be sued out, to which the defendant must appear, and the same pleadings are to be considered as the pleadings upon that writ.]

(*a*) *Anon.* p. 205, n.

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The Attorney General (with whom were *The Solicitor General, Jervis*, and *W. F. Pollock*) was not called upon to reply.

POLLOCK, C. B.—The Court entertain no doubt that the rule ought to be absolute in terms as prayed. There has been some misapprehension during the discussion as to the nature of this proceeding. It is an application on the part of the Crown to remove into this Court an action commenced in the Court of Common Pleas, on the ground that the Crown is interested in the event of the suit. Under such circumstances it appears to have been the practice of this Court (a practice from which we shall not depart, either now or upon any future occasion) to make the application, upon notice to the other party, not for a rule to shew cause, but for a rule absolute in the first instance; provided sufficient notice has been given to enable the other side to come in and be heard. Accordingly the Court have heard at considerable length (though not perhaps at greater length than the importance of the subject required) every thing that could be urged to induce the Court to refuse the rule. It was argued that this was an application which the Court ought not to entertain at all, and it was further urged that the plaintiff was entitled to be heard. If by that it was meant that there ought to be a rule to shew cause, and that the plaintiff should be heard by shewing cause upon affidavits in the ordinary way, I think the argument was not well founded. But if it merely meant that the plaintiff ought to be heard, inasmuch as notice had been given with the view to his being heard, I think the argument right. The Crown, though interested, is not a party to the record, but merely interposes and takes up the case of the defendant; and the latter is for all purposes in Court, and subject to the directions of the Court. With respect to the substance and merits of the case, I cannot in any respect distinguish this case from that of an ordinary action of trespass against an officer of the Crown. If an act has been done by any person on

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behalf of the Crown, and that is made the subject of an action of trespass, it is a matter of course that the action should be removed into this Court by a rule absolute in the first instance. It is true that the parties may be heard in opposition to the rule in the same way that a party may be heard to shew cause against a rule for an attachment, when the contempt is perfectly clear. But where an action of trespass is brought against an officer of the Queen acting in the execution of his duty, and the law officers of the Crown propose to remove the cause into this Court, they have a perfect right to do. Indeed the right is now so well established, that I should no more expect to find such an application resisted, than to hear of opposition to any of the common and ordinary motions, which are founded on the well-known established and daily occurring practice of the Court. But then it is said that this is an action between subject and subject, respecting a matter which relates to land, and not to the revenue of the Crown. That objection, however, is answered by the practice. The action of ejectment is primâ facie an action between subject and subject relating to land; and yet the prerogative of the Crown applies to that action, and if the interest of the Crown be concerned, it may be removed into this Court. It has been argued that the instance of an action of ejectment does not amount to an authority, because the application to remove it is in the nature of an injunction, which stays the proceedings. That, however, arises from the rule of law that an action of ejectment cannot be maintained against the Crown, but that the proceeding must be by writ of right. In the action of ejectment, the practice has been to remove the cause, although the effect of such removal is actually to extinguish the suit; and so far from that case having no application, it rather affords an à fortiori argument for removing the present cause, which is sought to be removed for the express purpose of going on with it. I refer to the action of ejectment as an authority for saying that the prerogative of the Crown applies to cases where land is the subject of dispute. Then it is said that this action in no

way relates to or touches the profits of the Crown, and a very subtle distinction is taken, founded upon the pleadings, namely, that the title of the Crown to the forest is admitted, and that the matter in dispute is, whether the locus in quo is part of the forest or not. But if the contention be whether or no the forest include within its bounds a certain tract of country, it matters not whether it be one acre or five hundred. Surely no person can say that the profit of the Crown is not touched, since the pleadings upon which the inquiry arises admit the title of the Crown to the forest, but deny that the right of the Crown exists in the locus in quo, because it is not part of the forest. Besides, as suggested by my Brother *Parke*, the Crown is materially interested, although this is a suit between party and party; for the judgment in this case might hereafter become evidence against the Crown as to the boundary of the forest, this being a right of a public nature. The general practice of the Court being well established in the case of chattels, where the interest of the Crown is concerned, and being also well established in cases of land by the course pursued with respect to the action of ejectment, what is there to prevent the application of the same rule to a case like the present? Does this case touch the profit of the Crown? It seems to me that it does. Does the title of the Crown come in question? Certainly as much so as in the case referred to by my Brother *Parke*, which is directly in point. Then it is said that we ought to impose certain terms. I think that the Attorney General is very properly cautious in endeavouring, so far as he is able, to prevent this rule from being made absolute on terms. It ought, however, to be absolute on this condition, that the plaintiff is to be placed with reference to the proceedings in this Court, in exactly the same situation with respect to the progress of the cause as he was in the Court of Common Pleas. The mode in which that is to be done, I own, I should have thought would have been rather a matter to be settled, either by the parties or by the officer of the Court; but without any express direction from the Court, it carries

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with it every thing that is necessary to put the plaintiff in a position as favourable and as advanced as he was in the other Court. It appears to me that the Crown is entitled to its prerogative of taking from the Court of Common Pleas the action which has been commenced there, and that the rule must be granted in the manner prayed for by the Attorney General.

PARKE, B.—I entirely agree with the Lord Chief Baron, and for the same reason, and as he has gone so fully into the case, I think it quite unnecessary to add anything.

ALDERSON, B.—I am of the same opinion. It is clear that the question here raised is a matter which touches the profit of the Crown. There is not, as is suggested, any hardship in the case. The whole matter arises out of this; that in ancient times it was found convenient that the several Courts should have certain peculiar jurisdictions. To the Court of Exchequer was assigned all cases touching the profit of the King, and, in order to bring them here, this proceeding by the Attorney General must be adopted. It is not in truth any claim of prerogative adverse to the subject because it belongs to the Crown. You cannot indict a person in the Common Pleas or in the Exchequer, nor can you bring a quare impedit in the Court of Queen's Bench, nor in the Exchequer, unless the King himself be personally concerned. The subject is as well off in the one way as the other.

PLATT, B.—It appears to me that the application of the Attorney General ought to be successful. Indeed, I own, on looking to the pleadings, that I should have thought him guilty of a breach of duty if he had not made the application, and insisted upon it as he has done. The fourth plea contains a direct assertion of the right of the Crown, and a justification by the defendant, as the servant of the Crown. To that, it is replied, that the Queen has neither the soil nor freehold in the particular spot where

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the trespass is alleged to have been committed. Does that raise no question respecting the title of the Crown? Surely it raises a question whether the locus in quo be parcel of the forest, and consequently whether the Queen be seised in fee of that part of the forest. It seems to me that it plainly raises a question as to the right of the Crown to the locus in quo, and that it is idle to talk of that not being within the meaning of the word "profit;" for what is the use of land except by reason of the profit which is derived from it. If, then, the land be taken away, the profit of the Crown is diminished. There can be no doubt that this is a matter relating to the revenue of the Crown, for the profit of the Crown is directly in question. It has been argued that this case is distinguishable from that of an action of ejectment, because there the proceedings are altogether put an end to. But there is a very plain answer to that, namely, that an action of ejectment will not lie against the Crown, and that the proper course in such case is to proceed by writ of right, in which, if successful, the Crown orders "that right be done."

Rule absolute (*a*).

(*a*) This case was decided in Hilary Term.

DIXON *v.* SLEDDON. *SC. 15 M&W. 427*

IN this case a rule nisi had been obtained to set aside a Judge's order, together with the judgment signed thereon, and all subsequent proceedings; or to reduce the amount levied by 150*l.* It appeared from the affidavits, that the plaintiff was the public officer of the Liverpool Borough Bank, and that the defendant being indebted to the bank in the sum of 1445*l.* 0*s.* 2*d.*, they employed an attorney of the name of Reddish, residing at Stockport, to serve the defendant with a notice of proceedings in order to make him a bankrupt. Upon receipt of this notice, the defendant

Semble, that the order promulgated on the 12th of June, 1846, respecting Judges' orders for judgment, does not necessarily render an *irregular* order actually made; though the execution of the consent may have been improperly attested.

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went to Liverpool, and there saw one of the managers of the bank, and offered to pay 300*l.* in a few days, and to give a cognovit for the residue of the debt. The manager told the defendant to call on Reddish at Stockport on the following Saturday, and sign the cognovit. He accordingly went, and on Reddish telling him that he must have an attorney to attest it on his behalf, the defendant said that he did not know any attorney at Stockport, and that his own attorney was at Liverpool. Reddish told him that he might choose him to act as his attorney; to which the defendant replied, that he had no objection, and signed the document produced to him, in the presence of Reddish, who charged him 13*s.* 4*d.* for attesting it. The document was as follows:—

"In the Exchequer of Pleas.

"Between William Dixon, one of the public officers of certain persons united in co-partnership for the purpose of carrying on the trade and business of bankers in England, according to the statute in such cases made and provided, called the Liverpool Borough Bank - - - - Plaintiff.

and

"Thomas Sleddon - - - - Defendant.

"I, the above-named Thomas Sleddon, hereby consent to an order for immediate final judgment for the sum of 3000*l.*, besides the plaintiff's costs of suit, to be taxed as between attorney and client; and that the plaintiff may, at any time or times after such judgment, sue out execution and levy the sum of 1445*l.* 0*s.* 2*d.*, (being the debt in this action), together with interest thereon, at the rate of 5*l.* per cent. per annum, from the 29th of January, 1846, until payment, and the costs aforesaid, together with the costs of execution, poundage, sheriff's and officer's fees, and all other subsequent incidental expenses, whether by fieri facias or capias ad satisfaciendum: and I consent that it shall be

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part of the terms of such order, that it shall not at any time, or in any event, be necessary, previous to issuing the said execution, to revive the said judgment, or to sue out or execute any writ of scire facias. And I hereby waive service upon me of any notice of taxation of costs, and of the copy of the order to be drawn up on this my consent. Dated, this 30th of January, 1846.

"Signed by the said Thomas Sleddon, in the presence of me, Edward Reddish, of Stockport, in the county of Chester, attorney of the Court of Queen's Bench at Westminster, as the attorney of the said Thomas Sleddon, expressly named by him, and attending at the execution hereof, at his request, to inform him of the nature and effect hereof, before the same was executed. And I certify that I did so inform him before the same was executed. And I hereby subscribe as, and declare myself to be attorney for him,

EDWARD REDDISH.

THOMAS SLEDDON."

The plaintiff drew up a Judge's order upon the above consent, and issued and levied execution for 1445*l.* 0*s.* 2*d.* The defendant, it appeared, had previously paid 150*l.*

The affidavit of the defendant stated, that at the time he executed the above document, he believed that he was signing a cognovit, and had no intention to sign any other document; that he would not have signed it, if he had understood or believed that it was not a cognovit, or that it would entitle the plaintiff to issue immediate execution against him. The present rule was granted on the ground that the Judge's order was not in conformity with the order promulgated on the 12th of June, 1846, relating to Judges' orders for judgment (*a*). "Where the defendant has not

(*a*) *Ante*, p. 243.

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appeared, or has appeared in person, no such order be made, unless the defendant attend the Judge, and give his consent in person, or unless his written consent be attested by an attorney acting on his behalf."

Martin shewed cause. There is no ground for the application. Even if the document in question had been a cognovit, or a warrant of attorney, Reddish would have been competent to attest it, for he was not the attorney of the plaintiff, but a mere party to whom the document was sent for the purpose of execution. But in this case no attestation was necessary, for it has been expressly decided that the 1 & 2 Vict. c. 110, s. 9, does not apply to Judges' orders; *Baker* v. *Flower* (*a*). The order of the 12th of June, 1846, which has been referred to, is not a rule of Court. [*Parke*, B.—It is only a rule which we have made amongst ourselves, that we will not grant an order for judgment, unless the form prescribed be complied with; but if it be not, the omission does not render the order void.]

Jervis and *Burnie*, in support of the rule. The order promulgated on the 12th of June, 1846, has the effect of a rule of Court. Its object was to prevent parties from fraudulently obtaining Judges' orders for signing judgment, and to place such orders on the same footing, with respect to attestation, as cognovits and warrants of attorney. [*Parke*, B.—The order was promulgated in consequence of a doubt entertained by some of the Judges whether these orders for judgment ought to be allowed, but it was resolved to sanction them, as they might, in many cases, be a great saving of expense to defendants.] The order adopts the language of the 1 & 2 Vict. c. 110, s. 9, under which it has been held, that the attorney of the plaintiff, is not competent to attest the instrument on behalf of the de-

(*a*) 8 M. & W. 670.

fendant; *Mason* v. *Kiddle* (*a*). So in *Pryor* v. *Swaine* (*b*), it was held, that the London agent of a plaintiff's attorney, whose name had been suggested to the defendant by the plaintiff's attorney, was incompetent to attest the execution of a warrant of attorney by the defendant. There, *Coleridge*, J., says, "No real distinction can be made between the principal and agent, either as to the act done, or the duty attaching to the party in the doing it. It must be considered as an act done by the principal, and as that principal was the plaintiffs' attorney, he could not contract any obligation to the defendant, adverse to the interests of the plaintiffs', and could not stand, therefore, in that relation, towards him, which the statute requires of the attesting attorney." The party requires protection whether he signs a consent to a Judge's order, or a cognovit. The same principle will apply to both cases. [*Parke*, B.—The attorney in the country may not have been aware of the rule we promulgated: it is not like a rule of Court which it is his duty to know of.]

It was then suggested by the Court that the rule should be absolute to return the 150*l.* which had been improperly levied, together with the costs incurred in respect of that sum.

Rule accordingly.

(*a*) 5 M. & W. 513.

(*b*) *Ante*, vol. 2, p. 37.

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8 e 15 M W. 346

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The 7 & 8 Geo. 4, c. 29, s. 34, enables the owner of a fishery or his servants to take into custody any person unlawfully fishing therein. The plaintiff was fishing near a spot where P. had a private right of fishery, where the servants of P. seized the plaintiff's net, and took him into custody, under a bonâ fide, but mistaken, belief that the plaintiff was fishing in the fishery of P.: *Held*, that the defendants were entitled to the protection of the 7 & 8 Geo. 4, c. 29, and that the venue ought to have been laid in the county where the cause of action arose.

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TRESPASS for assaulting the plaintiff, and imprisoning him, and forcing and compelling him to go in custody along a certain public way, and seizing and taking from him a certain net and lines, &c.

Plea, not guilty (by statute).

The venue was laid in Anglesey, and at the trial before *Parke*, B., at the summer assizes, 1845, it appeared that the defendants were the gamekeepers of Colonel Dawkins Pennant, who was the owner of a private fishery in the straits of Menai, in the county of Carnarvon; and that the action was brought for seizing the plaintiff's net, and taking him into custody while fishing on the Lavan Sands, in the Menai Straits. The defendants justified under the 7 & 8 Geo. 4, c. 29, on the ground that the plaintiff was illegally fishing in the water in which Colonel Pennant, the defendant, had a private right of fishery. The jury found that the spot where the plaintiff was fishing was not the fishery of Colonel Pennant, though only a few yards distant from it; but that the defendants acted under a bonâ fide belief that the plaintiff was fishing in the fishery of Colonel Pennant. It was thereupon contended that the verdict ought to be entered for the defendants, inasmuch as the venue was not laid in the county in which the cause of action arose. The learned Judge was of that opinion, and directed the jury to find for the defendants, reserving leave to the plaintiff to move to enter a verdict for him, with 5*l.* damages.

Jervis having obtained a rule nisi accordingly,

Yardley (with whom was the *Solicitor General* and *Townsend*) shewed cause. The 7 & 8 Geo. 4, c. 29, s. 34, enacts, "That if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run

through or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money not exceeding five pounds, as to the justice shall seem meet." The 35th section enacts, "That if any person shall at any time be found fishing against the provisions of this act, it shall be lawful *for the owner of the ground, water, or fishery*, where such offender shall be so found, *his servants*, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner," &c. The 63rd section, for the more effectual apprehension and discovery of all offenders punishable under that act, enacts, "That any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the day time, may be immediately apprehended without a warrant by any peace officer, or by *the owner of the property on or with respect to which the offence shall be committed, or by his servant* or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law," &c. The 75th section, for the protection of persons acting in the execution of the act, enacts, "That all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was com-

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mitted, and shall be commenced within six calendar months after the fact committed and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon," &c. The current of authorities establish this, that if a party act bonâ fide, having reasonable ground for believing that what he does is in pursuance of the statute, he is entitled to its protection. The case relied upon by the plaintiff at the trial was *Hopkins* v. *Crowe* (*a*). There a hired driver of a cabriolet having brought home the horse apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse. The policeman said that if the complainant charged the driver with cruelty to the horse he would take him into custody, and the complainant said, "I do," and the policeman apprehended the driver under the statute 5 & 6 Wm. 4, c. 59, s. 9. It was held that the complainant must be considered not as a party giving information to the officer in consequence of which he was arrested, but as a principal, causing the arrest to be made; and that he was not entitled to the notice of action which the statute requires to be given to persons sued for any thing done in pursuance of it. But that case is distinguishable from the present; for, by the 9th section of the 5 & 6 Wm. 4, c. 59, the only persons entitled to arrest an offender are an officer, or the owner of the animal ill-treated. The cases which have arisen under the 24 Geo. 2, c. 44, are analogous to the present case. In *Bird* v. *Gunston* (*b*), Lord *Mansfield* says, "When the justice thinks he is acting, and means to act, in the execution of his office, it is sufficient, otherwise the protection held out by the statute of Geo. 2 would be nugatory. A man wants no protection when his conduct is strictly right." *Prestidge* v.

(*a*) 4 A. & E. 774. (*b*) 4 Doug. 275.

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Woodman (*a*) decided, that where a magistrate acts upon a subject-matter of complaint over which he has authority, but which arises out of his jurisdiction, he is entitled to notice of action. So where *one* magistrate committed the mother of a bastard for not affiliating her child, it was held that he was entitled to notice of action, although the 18 Eliz. c. 3, s. 2, gave jurisdiction to *two* magistrates only; *Weller* v. *Toke* (*b*). Under the Excise Act, 23 Geo. 3, c. 70, s. 30, it has been held that an excise officer is entitled to notice before action brought, for an act not warranted by his official capacity, if done bonâ fide in the supposed execution of his duty; such as the assaulting an innocent person whom he suspects to be a smuggler employed in running goods; *Daniel* v. *Wilson* (*c*). A party is entitled to protection whenever he has reasonable ground for supposing that the thing done by him was done in the execution, or under the authority, of the statute; *Cook* v. *Leonard* (*d*). The Court called on

Jervis and *Welsby* to support the rule. The true principle is this, that if the party sued actually fills the character to which the protection is intended by the statute to be given, he is entitled to the immunities of the statute; although in the supposed exercise of his duty he has exceeded his authority. But the statute does not apply to persons who do not fill the particular character which it intended to protect. The 63rd section of the 7 & 8 Geo. 4, c. 29, must be read together with the 75th, and the protection given by the latter section must be confined to the persons mentioned in the former. The 63rd section does not authorize "any person" to apprehend an offender; but only a peace officer or "the owner of the property on or with respect to which the offence shall be committed, his servant, or any person authorized by him." The word

(*a*) 1 B. & C. 12; S. C. 2 D. & R. 43.
(*b*) 9 East, 364.
(*c*) 5 T. R. 1.
(*d*) 6 B. & C. 351; S. C. 9 D. & R. 339.

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person in the 75th section means the person mentioned in the 63rd, that is the owner of the land or his servant, &c. Suppose the statute had not enabled the defendant to plead the general issue, must he not have alleged in a special plea of justification, that he was the owner, or the servant of the owner, of the property on which the offence was committed? Without such an allegation the plea would be clearly bad; it would resemble a plea under the 24 Geo. 2, c. 44, s. 1, by a person not a justice of the peace; *Jones* v. *Williams* (*a*): or a plea under the Excise Act by a person not an excise officer; *Daniel* v. *Wilson* (*b*). *Ballinger* v. *Ferris* (c); *Butler* v. *Ford* (*d*); *Wedge* v. *Berkeley* (*e*); *Norris* v. *Smith* (*f*), were cases in which the party acting was the person eo nomine, authorized by the statute to act. No case can be found in which protection has been afforded to a party not filling the particular character mentioned in the statute. *Bush* v. *Green* (*g*), and *Lidster* v. *Borrow* (*h*), decided that a gamekeeper acting under a deputation granted and registered before the 1 & 2 Wm. 4, c. 32, is not entitled to notice of action under the 47th section of that act. In *Hopkins* v. *Crowe* (*i*), *Patteson*, J., says, that "section 9 of stat. 5 & 6 Wm. 4, c. 59, extends only to an officer, or the owner of an animal ill-treated, acting upon view or information. The defendant was neither officer nor owner. It is said, that he was, nevertheless, entitled to the protection of notice, because he acted bonâ fide. But to what extent would such a rule go? For example, by a late act (*k*) as to game, persons trespassing on lands may, in certain cases, be arrested by the occupier of the land or his servant, or other persons having certain authorities; and, in actions for anything done in pursuance of that act, notice of action is

(*a*) 3 B. & C. 763; S. C. 5 D. & R. 654.
(*b*) 5 T. R. 1.
(*c*) 1 M. & W. 628.
(*d*) 1 Cr. & M. 662.
(*e*) 6 A. & E. 663; S. C. 1 N. & P. 665.
(*f*) 10 A. & E. 188; S. C. 2 P. & D. 353.
(*g*) 4 Bing. N. C. 41; S. C. 5 Scott, 289.
(*h*) 1 P. & D. 447; S. C. 9 A. & E. 654.
(*i*) 4 A. & E. 774.
(*k*) 1 & 2 Wm. 4, c. 32.

required, and other restrictions are imposed. According to the argument used to-day, a person not being owner or occupier of the lands, nor otherwise authorized, but thinking himself entitled to act, might arrest a trespasser; and, if sued, insist upon the protections of the statute." To entitle the party to the benefit of the statute, he must be the owner of the land, or his servant, &c., having reasonable ground for believing that what he did was in pursuance of the statute; *Cann* v. *Clapperton* (*a*); *Jones* v. *Gooday* (*b*); *Rudd* v. *Scott* (*c*).

POLLOCK, C. B.—The rule ought to be discharged. At the trial, the learned Judge directed a verdict to be entered for the defendant, and reserved liberty for the plaintiff to move to enter a verdict with 5*l.* damages, if the Court should be of opinion that the defendant was not entitled to the protection of the act. I think it unnecessary to advert to the very long list of cases presented to the Court by Mr. *Yardley*, or the still longer list brought under our notice on the present occasion by Mr. *Jervis*. It appears to me that we ought to endeavour to ascertain what is the meaning of the act of Parliament, and so to construe it as to make the decisions consistent. I own that I consider the object of the clause to be this, that where a person has really and honestly done something in pursuance of the statute, he is entitled to be protected by the statute. Every act consists of time, place, and circumstances, and it is admitted on all hands, that a variety of cases have decided, with respect to circumstances, that where a magistrate is wrong in doing alone that which is required to be done by two magistrates; or where he commits for twelve months when he had only power to commit for six months; or when he is wrong in conceiving that he had jurisdiction, and, in point of fact, had no jurisdiction; in all these cases, the

(*a*) 10 A. & E. 582; S. C. 2 P. & D. 560.

(*b*) 9 M. & W. 736; S. C. 1 Dowl. 914, N. S.

(*c*) 2 Scott, N. R. 631.

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magistrate is justified, provided he has a general jurisdiction. There are cases which decide that the time in which a particular act is to be done need not be strictly pursued. *Cann* v. *Clapperton* (*a*) is one; and, if an *act* may be done a day or two after the time prescribed, I do not see why *place*, which is a necessary ingredient in every matter connected with human affairs, should not be within the same rule. Accordingly, it has been decided with respect to magistrates, that if they are acting out of their jurisdiction, but in pursuance of a general authority, they are protected. I cannot distinguish this case from that of a magistrate who acts out of his jurisdiction, for if you look at the clause, you find that the protection extends to all persons who act in pursuance of the statute. We are bound to read an act of Parliament so as to give effect to its ordinary meaning, and the meaning of this act is, that all persons whatever shall be protected, if really acting in pursuance of the statute, that is, bonâ fide and honestly believing themselves to be acting under its provisions. In this case the jury have found that the defendant acted not only bonâ fide, but under a reasonable belief that what he did was in pursuance of the statute. Where a party acts strictly in pursuance of a statute, he does not require any protection; the object of a clause like the present is to give protection in cases where the party *believes* that what was done was done under the authority of the statute, although it turns out, on strict examination, that the act cannot be supported. If the language of the 75th clause had repeated the words of the 63rd section, I should have come to the same conclusion, for I should have read the act thus:—the owner of the estate shall have certain powers, namely, to arrest persons trespassing; but if he make any mistake in what he does in pursuance of this act—if he do that which is wrong with respect either to time, place, or circumstances, he shall be protected, provided he honestly believed that he was acting in pursuance of the act. The statute makes no

(*a*) 10 A. & E. 582; S. C. 2 P. & D. 560.

distinction between the act of seizing a fishing rod without a previous demand, and the endeavouring to arrest beyond the limits of the domain. Therefore, if the act is to receive a more limited construction, and if we are to transfer the words of the 63rd clause to the 75th, I should still come to the same conclusion. But I put the case upon larger grounds, and I say, here is protection given to persons acting in pursuance of a statute, and it makes no difference whether the error is with respect to the act done, or the place where done, or the time when done, if done in pursuance of the statute, that is, bonâ fide, and with a reasonable belief that the statute extends to it. Here the defendants' master was the owner of a fishery in the immediate neighbourhood of the place where the act was committed, and the persons who seized the net were his servants. Under these circumstances it is not necessary to say how far the protection of the act would extend to a person who did not believe himself to be acting under it, because here the jury have found that the defendants were bonâ fide acting under a belief that what they did was in pursuance of the statute. At the same time I admit the general principle as contended for by the plaintiff, and can well understand it as applicable to a variety of cases.

ROLFE, B.—I am of the same opinion. The facts of the case, so far as they are necessary to raise the question, are very short. [His Lordship stated the facts.] Was the defendant, under these circumstances, entitled to the protection of the statute? Undoubtedly he would have been, if the owner of a fishery at the spot in question; and, though during all the argument my opinion has been that he was entitled to protection, I am free to confess that the ground of my opinion has changed. I at first thought that the defendants were entitled to notice, because their master was the owner of a fishery, which, though it did not extend to the locus in quo, yet was adjoining the place where the trespass was committed; but upon consideration, and adverting to the argument of Mr. *Jervis* as to how the matter

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would stand if stated in the form of a special plea, I cannot help thinking that it would be very difficult to support such a plea. At the same time I am of opinion that the statute extends to *all* persons whatever against whom an action is commenced for any thing done in pursuance of the act. The language of the clause is general, and what right have we to limit it? There must be something done in pursuance of the statute; but it is evident that the clause does not mean what the words literally import, for in that case there would be no need of notice; the clause must be construed thus: acting bonâ fide under a belief that the act is done in pursuance of the statute. It is said that any person doing an act which he bonâ fide believes to be authorized by the statute, is within the protection of the statute; but that requires some qualification. It must be limited to persons who are supposed to know the law, and who bonâ fide believe themselves to be the owners of the land, and therefore think they are justified. In that way we get rid of the difficulty arising from the judgment of my Brother *Patteson* in *Hopkins* v. *Crowe* (*a*). In that case the defendant thought that he had a right to protection, though he was not the owner of the animal. The question here is, did the parties know the law, and think the facts brought them within it. The case of *Bush* v. *Green* (*b*) may be distinguished on that ground, because there the defendant could not have reasonably considered himself a gamekeeper. My judgment proceeds upon the general principle, that all persons who bonâ fide believe that they act in pursuance of the statute, are entitled to its protection.

PARKE, B.—I agree in opinion. The question turns upon the construction of the 75th section, and it must be construed in the same way that we construe all acts of Parliament, according to their ordinary grammatical sense, provided such construction does not lead to a manifest absurdity. The section provides "for the protection of

(*a*) 4 A. & E. 774. (*b*) 4 Bing. N. C. 41; S. C. 5 Scott, 299.

persons acting in the execution of that act," and it is general in its terms "that all actions and prosecutions to be commenced against any person for any thing done in pursuance of that act," &c. The context shews that the words "in pursuance of the act" are not to be read in their strict and literal sense; because protection would be unnecessary, if the party acted strictly within the provisions of the statute. Therefore those words must in some degree be qualified and modified: also, because the cases shew that the words are to be construed "bonâ fide believing that what was done was done in pursuance of and authorized by the act." Then we must read the clause in the same way as if instead of the words "in pursuance of this act," the words were "bonâ fide believing himself within the act." Any person who really and bonâ fide believes that he is authorized by the act is within its protection; but then he must know the act, and must bonâ fide believe himself the owner of the fishery in defence of which the trespass has been committed. The jury have already decided that question. That was the construction which I put upon the statute when the point was for the first time before the Court, and the reason why I reserved the point was out of respect for the dictum of my Brother *Patteson* in *Hopkins* v. *Crowe*. On looking through the authorities, it appears that the great bulk are decisions on clauses which give protection eo nomine to particular persons; such as the statute 24 Geo. 2, c. 44, under which the party must be a justice of the peace or a peace officer, to be entitled to the benefit of the act. So where certain powers are given by local acts to trustees, the parties claiming the protection of the act must be trustees; though if they are trustees de facto, it would be sufficient. That disposes of the majority of the cases which have been cited, except the case of *Bush* v. *Green*, where it is to be observed, that the point here raised was only incidentally mentioned in the argument. With respect to the case of *Hopkins* v. *Crowe*, I agree that the defendant there could not be entitled to protection, because he could not have bonâ fide supposed that he filled the

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character which the statute intended to protect. There is no decided case which calls upon us to put any other construction on the section in question than this;—that it extends to all persons who bonâ fide believe that they are authorized by the act, and who fill the character in all respects to which the act applies. The rule ought to be discharged.

Rule discharged.

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5 C. 15. In W. 438. LAMBE *v.* SMYTHE.

The word "residence" in the 3 & 4 Wm. 4, c. 42, s. 8, (which requires a plea in abatement for noujoinder to be accompanied by an affidavit stating the place of residence of the party not joined), means the "domicile or home" of such party: therefore an affidavit which described the party as resident at a certain place which was his home, was held a sufficient compliance with the statute, although the party was not then there, but had gone abroad for a short time.

4 W. L. 92.

ASSUMPSIT for work and labour, money paid, &c.

The defendant pleaded in abatement the non joinder of nine co-contractors. The affidavit of verification stated that one of them, Sir George Rich, resided at No. 43, Lowndes Street, Belgrave Square.

A rule nisi had been obtained to set aside the plea, on affidavits which stated, that at the commencement of the suit, Sir George Rich was not living at No. 43, Lowndes Street, Belgrave Square: that a person who had gone there to serve him with process was informed that the house was the property of Colonel Austin, and that Sir George Rich had left it for some time past, and had gone to France: that diligent inquiries had been made to obtain the place of residence of Sir George Rich, but without effect: that the house in question had become unoccupied, and was then in the care of a person employed to let it, and who, on being applied to as to where Sir George Rich could be found, replied that he knew nothing about him.

Jervis shewed cause, upon affidavits which stated that the house in question was the furnished residence of Sir George Rich, and had been in Colonel Austin's occupation only as a friend and visitor of Sir George Rich, to whom the house and furniture then and still belonged: that Sir George Rich was residing there at the time of the commencement of the suit, but being about to leave town for a few months for the

benefit of his health, was endeavouring to let it furnished until his return. It was submitted, that under these circumstances there was a sufficient compliance with the statute 3 & 4 Wm. 4, c. 42, s. 8, which enacts, "that no plea in abatement for the nonjoinder of any person as a co-defendant, shall be allowed in any Court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea."

Lush, in support of the rule, contended that the statute had not been complied with, inasmuch as its object was to compel the party pleading in abatement to give such information respecting the residence of the co-contractor as would enable the plaintiff to serve him with process.

Cur. adv. vult.

POLLOCK, C. B.—This was a motion to set aside a plea in abatement, on the ground that the affidavit did not disclose the true residence of a party who ought to have been joined. We are all of opinion, however, that the residence stated here was the true residence of Sir George Rich, and, consequently, that the rule ought to be discharged, but without costs. The affidavits on which it was moved, no doubt, state that Sir George Rich was not living there at the time; but when all the facts come to be inquired into, it appears that the statute has been complied with. The word "residence" in it must be understood in the sense of a man's home.

PARKE, B.—It means "domicile or home," and this appears to have been that of Sir George Rich.

PLATT, B.—The language of the 3 & 4 Wm. 4, c. 42, at first induced me to hold a different opinion, but on

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looking to the cases decided before that act, as to giving the residence of parties not joined, I agree in opinion with the rest of the Court. The cases to which I allude are *Newton* v. *Verbeke* (*a*), and *Taylor* v. *Harris* (*b*). The statute commands that to be done which the Courts formerly required to be done.

Rule discharged (*c*).

(*a*) 1 Y. & J. 257.
(*b*) 4 B. & A. 93.
(*c*) Without costs.

IN THE EXCHEQUER CHAMBER.

DEAN *v.* THE QUEEN in Error.

A commission tested 21st of February, and returnable 15th of April, 1843, authorized the commissioners to inquire whether D. is *now* indebted to the Crown in any and what sums. The inquisition thereon, dated 1st of March, 1843, found that D. was, *on the day of taking the inquisition*, indebted to the Queen in a certain sum, for customs duty on silk imported by him between the 8th and 14th of February, 1841. A scire facias issued on this inquisition, tested the 30th of March, 1843. *Held*, first, that the finding in the inquisition was not inconsistent with the authority given to the commissioners, and that the form of the commission and inquisition was according to the established precedents. Secondly, that the fact of the scire facias having issued before the commission was returnable, was a mere irregularity, and not a ground of error.

ERROR upon a judgment in scire facias. Upon an inquisition to find debts, the scire facias, which bore *teste* the 30th of March, in the sixth year of the reign of her present Majesty, and was returnable on the 15th of April in the same year, stated, that by an inquisition taken on the 1st of March in the same year, before the commissioners appointed under a commission issued out of the Court of Exchequer, it was found that John Dean was, on the day of taking the said inquisition justly and truly indebted to the Queen in 262*l.* 10*s.*, for the duty of customs on foreign silks, imported into the United Kingdom from foreign parts, between the 8th of February, 1841, and the 14th of February, 1841, and that the said sum of 262*l.* 10*s.*, and every part thereof, then remained due and unpaid.

The defendant craved oyer of the commission, which was set out. It bore teste the 21st of February, in the sixth year of the reign of her present Majesty, and was returnable on the 15th of April in the same year, and authorized the commissioners therein-named, to inquire "whether the said J. Dean and W. S., or either of them, be *now* indebted to us, in any and what sums of money for the duties aforesaid." The defendant also craved oyer of the inquisition returned under the commission, which was also set out, and purported to be taken on the 1st of March in the same year, whereby it was found, "that J. Dean, importer of foreign silks, in the said commission named, is, *on the day of taking this inquisition*, justly and truly indebted to her Majesty in the sum of 262*l.* 10*s.*, for the duty of customs on certain foreign silks, by him the said J. Dean, imported into the United Kingdom from foreign parts, between the 8th day of February, 1841, and the 14th day of February, 1841, and that the said sum of 262*l.* 10*s.*, *and every part thereof still remains due and unpaid.*" This inquisition was returned on the 1st of March, 1843. The defendant then pleaded, that he was not, on the day of taking the inquisition under the said commission, justly and truly indebted to her Majesty in the said sum, or any part thereof, modo et formâ. Issue having been joined thereon, the cause came on for trial, and a verdict passed for the Crown for 137*l.* 16*s.*, and judgment was given accordingly. A writ of error having been brought upon that judgment, it was argued by

Montagu Chambers for the plaintiff in error. The first objection is, that the finding of the commissioners is not in conformity with the inquiry directed by the commission. The commissioners had authority to inquire what debt (if any) was due from J. Dean to her Majesty at the date of the commission, which is the 21st of February, 1843; but the finding upon the inquisition is, that Dean was indebted on the day of taking the inquisition, that is, on the 1st of

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March, 1843. The finding of a debt due at a different time from that directed by the commission, is a finding without jurisdiction, and void. It will perhaps be said that the defect is aided by that part of the inquisition which alleges that the goods were imported between the 8th of February, 1841, and the 14th of February, 1841; but though the goods were imported at that period, the debt in respect of the dates thereon might not have accrued until after the date of the commission. [*Tindal*, C. J.—The duty becomes a debt from the moment of importation.] *Stoughter's case* (*a*) shews that the finding must pursue the authority: there a writ of melius inquirendum, reciting a former office that P. S. was seised of a certain manor and died seised, 40 Eliz., was awarded to inquire whether the said manor, at the death of P. S., was held of the king (James the First); and the finding was, that the manor was held at the time of the death of P. S., of the late Queen Elizabeth; and the Court said, "that although the finding were well, yet forasmuch as it was without the warrant of the writ, it was insufficient and void." In the *Doctrina Placitandi*, p. 79, it is thus laid down, "Si home plead un commission, il doit monstre que les commissioners avoyent authority de determiner mesme le matter, que fuit al eux refer in commission," and reference is made to *Page's case* (*b*). Unless the finding pursue the authority given by the commission, the witnesses could not be indicted for perjury. Secondly, the scire facias issued before the commission was returnable, and therefore before any debt appeared upon the record. Formerly, a commission could only have been made returnable in Term; but the 5 & 6 Vict. c. 86, s. 8, gives power to issue commissions, &c., tested and returnable "on any day certain in Term or Vacation, to be named in such commission." But in this case the Crown has not availed itself of the provisions of that statute, the scire facias being made returnable in the ensuing Term. In *West on Extents*,

(*a*) 8 Rep. 168.

(*b*) 5 Rep. 52.

it is said (*a*), "that the scire facias, though it may be sued out in Vacation, must be tested in Term, and must be made returnable in Term;" and reference is made to the case of *Rex* v. *Pearson* (*b*). There an inquisition to find debts, executed in Vacation, was returnable in the following Term, and a writ of scire facias being issued thereon, tested as of the Term preceding the Vacation, the Court set aside the writ for the repugnancy apparent on the face of the record, and would not allow it to be aided by inserting the true dates by means of a memorandum on the record. There *Wood*, B., says, "this is not a case in which we ought to depart from the ancient practice of the Court, which has always been, never to issue a scire facias till after the return of the inquisition; and that practice is founded in good reason, for the debt is not of record till then." The objection does not amount to an irregularity only, but is a defect in substance, which renders the whole proceeding void. The case resembles that of a cause proceeded in without any writ having been issued.

James Wilde for the Crown. With respect to the first objection, it will be found, on referring to the precedents, that the commission and inquisition follow the forms invariably used in practice; *Manning's Exch. Practice*, 261, 2nd ed.; *West on Extents*, App. p. 18. An inquisition in any other form would be bad, as appears from the case of *Rex* v. *Green* (*c*), where an extent having issued against M. dated in February, an inquisition which was taken thereupon in May following, found G. indebted to M. "in February, scilicet die emanationis brevis de extent;" and the inquisition was quashed, because debts are not bound by the teste of the extent, but only "a die captionis inquisitionis." The object of the commission is to ascertain whether any debt be due to the Crown, and the important

(*a*) Page 316.
(*b*) 3 Price, 288.
(*c*) Bunb. 265.

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subject of inquiry is, whether a debt exist at the time of the inquisition. In the present case it appears, on the face of the inquisition, that there was a debt at the time of the issuing of the commission; for the goods are found to have been imported prior to the date of the commission. In the case of *The Attorney General* v. *Ansted* (*a*), it was held that the 3 & 4 Wm. 4, c. 57, s. 8, did not alter the imposition of duty on goods imported, and that the liability to duty attached immediately upon importation, although that statute enabled the importers in certain cases to postpone payment. [*Maule*, J.—Suppose the goods had been imported and bonded, and remained so until the present time, would the jury be warranted in finding the debt? It is consistent with the statement in the inquisition, that the goods were imported before the date of the commission, and remained in bond until after the commission issued, and were taken out of bond before the inquisition.] The debt would nevertheless exist at the time of the commission, although not payable until a subsequent period. The inquisition only finds that there is a debt, and if the time for payment has not arrived, that fact should be pleaded to the scire facias. With respect to the second objection, it amounts only to an irregularity, for which, perhaps, the writ might have been set aside, as in the case of *Rex* v. *Pearson* (*b*), but the defect is cured by appearance. *Vaughan* v. *Lloyd* (*c*) is an authority in point. There in an audita querela, the party appeared on the scire facias and demurred, because it bore date before the audita querela; and the Court agreed, that if it had been a scire facias on a judgment, the defect would have been cured by appearance; for there the scire facias is the foundation, and quasi an original; but it was otherwise where the scire facias is only to bring the party in to answer, and in the nature of mesne process, and the judgment is given on the audita querela.

(*a*) 12 M. & W. 520.
(*b*) 3 Price, 288.
(*c*) 1 Vent. 7.

A wrong date to a scire facias is no ground of error; *Read* v. *Wilmot* (*a*). A mere irregularity in process is cured by appearance. In *Robert* v. *Andrews* (*b*), a writ of account was brought in Norfolk, and the capias ad computandum awarded to London instead of the sheriff of Norfolk, and Lord *Coke* held, that there having been an appearance upon the process, it was made good. In *Bac. Abr.* tit. "*Error*," (K 5), it is said, "if upon audita querela a scire facias be brought, bearing date before the audita querela, and the defendant appear and for this cause demur, this fault is cured by the appearance; for the audita querela is more of the nature of a commission than a writ; and if the party be in Court, the matter ought to be inquired into without inquiring into the nature of the process by which he was brought in." Here the inquisition was in fact returned before the scire facias issued; and, since the recent statute, there is no difficulty in filing the commission of record in Vacation so as to make its return correspond with the inquisition. An immediate extent may issue on a commission and inquisition, if they are actually returned before the return day; *West on Extents* (*c*).

Montagu Chambers in reply. No answer is given to the objection that there was no authority to swear the witnesses upon any other matter than that specified in the commission. The entries which have been referred to are mere forms, and cannot cure a defect in substance. *The Attorney General* v. *Ansted* is an authority in favour of the plaintiff in error, for it shews, that although the goods are imported the duty may not be due. The goods might either remain in bond, or be taken out by some person other than the importer, in which case the latter would not be liable to the duty. It is quite consistent with the finding in this case, that the liability which existed before did not become a debt until after the date of the commission. As to the

(*a*) 1 Vent. 220.
(*b*) 1 Cro. Eliz. 82.
(*c*) Page 48

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other point, the objection is treated in *Rex* v. *Pearson* (*a*) as a repugnancy, not as an irregularity. *Thompson*, C. B., there says, "There is a manifest incongruity on the face of the proceedings to which the record is to give effect; the inquisition issued in Vacation, and this scire facias is made also to issue in Vacation, returnable in Michaelmas Term, and tested in Trinity Term. So that on the face of the proceedings, the writ appears to have issued before the demand arose on which the defendants were so sued; that is, therefore, an objection to the process, because it ought not to have been issued, for it could not then be supported, in point of fact." In *Vaughan* v. *Lloyd* (*b*) the scire facias was in the nature of mesne process; here it is similar to a scire facias on a judgment. In the forms given in *West on Extents*, two dates are stated as to the time when the debt became due.

J. Wilde claimed on behalf of the Crown, and was allowed the general reply.

Cur. adv. vult.

The judgment of the Court (*c*) was now delivered by

TINDAL, C. J.—The first objection raised on this record is, that the finding of the commissioners under the inquisition is not in conformity with the inquiry directed by the commission. The commission, as it appears on the record when set out on oyer, directs the commissioners to inquire whether John Dean be *now* indebted to her Majesty in any and what sums of money for the duties aforesaid; and the commission is tested on the 21st of February, in the sixth year of her Majesty's reign. It is argued that the commissioners are confined to the inquiry whether John Dean were indebted on that day. The inquisition, which is also set out on record, was taken on the 1st of March of

(*a*) 3 Price, 288.
(*b*) 1 Vent. 7.
(*c*) *Tindal*, C. J., *Williams*, J., *Coleridge*, J., *Coltman*, J., *Maule*, J., *Cresswell*, J.

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the same year, and the commission finds, on the oath of good and lawful men therein mentioned, that John Dean, on the day of taking this inquisition, is justly and truly indebted to her Majesty in the sum of 262*l.* 10*s.* for duty of customs on certain foreign silk, by him the said John Dean imported into the United Kingdom from foreign parts, between the 8th of February, 1841, and the 14th of February, 1841; and that the said 262*l.* 10*s.*, and every part thereof, still remains due and unpaid. We are of opinion that there is no inconsistency whatever between the finding of the jury and the authority given to the commissioners, for the inquisition finds the duty to have become due on the 14th of February, 1841, and as the inquisition further proceeds to find that it still remained due and unpaid on the 1st of March, the day on which the inquisition is taken, it follows necessarily that the jury find the duty to be due on the 21st of February, the day on which the commission was issued: indeed, it is manifest, from the special finding of the origin of the debt, that it must have been a debt from the 14th of February, 1841; for it has been decided that the importer of goods from a foreign country becomes liable on importation to the duties of customs payable thereon; *The Attorney General* v. *Ansted* (*a*); and the latest day of the importation in this case is found to be the 14th of February. But even if the origin of the debt had not so distinctly appeared on the inquisition, it appears from the inspection of a great number of commissions, and inquisitions taken thereon, with which we have been furnished from the year 1777 downwards, that the commissions and inquisitions have always been framed in the same precise form as the present; so that the course and practice, which is the law of the Court, would have been a sufficient sanction for the form in which the documents in question are issued, even without any other answer to the objection first taken.

The second objection raised upon the record was that the writ of scire facias, issued before the commission was returnable; and, therefore, before any debt appeared upon

(*a*) 12 M. & W. 520.

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the record, the commission being returnable on the 15th of April, and the scire facias bearing teste on the 30th of March, and being made returnable on the same day as the commission, namely, the 15th of April. But we are of opinion that that objection amounts only to an irregularity, and not to error on the record. In the case of *Rex* v. *Pearson* (*a*), on which the plaintiff in error relies, the objection, which is precisely the same as the present, was treated by the defendants as matter of irregularity only, and so held by the Court. The scire facias in this case is only in the nature of process to bring the party into Court to answer; and if the teste of mesne process be too early, that does not make the process a nullity but irregular only. We, therefore, think that the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

(*a*) 3 Price, 288.

JC 15 MW 88.

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Assumpsit. The declaration stated that the defendant and A. were in partnership as attorneys, and in consideration that the plaintiff would retain them as such attorneys, to conduct an action at the suit of B. against one L. for negligent driving, the defendant and his partner promised to fulfil their duty as such attorneys in and about prosecuting the said action, and recovering damages: it then alleged that the defendant and his partner did, under the said retainer, commence an action against L., and such proceedings were thereupon taken that B. recovered judgment against L. for 56*l.* 15*s.*: that afterwards the defendant and his said partner, *as such attorneys as aforesaid*, for obtaining satisfaction of the said damages, sued out a writ of fi. fa., to which the sheriff returned that he had levied 9*l.*, part of the damages, and nulla bona as to the residue: that the defendant and his said partner, *as such attorneys as aforesaid*, for obtaining satisfaction of the said residue, issued a ca. sa., by virtue whereof L. was imprisoned, and paid the residue of the damages to the governor of the gaol, who paid the same to the defendant and his partner, *as such attorneys as aforesaid:* that before they received the same they sent, as such attorneys as aforesaid, to the gaoler, a discharge of L. out of custody, by virtue whereof he was discharged. Breach: that although the defendant and his partner received the said damages, and the plaintiff duly paid to them, as such attorneys as aforesaid, their costs and charges of prosecuting the said action, yet they had not paid to B. or the plaintiff, the residue of the said damages.

THE parties in this case, which is reported *ante*, p. 309, not having consented to amend, the following judgment of the Court was afterwards delivered by

Held, that the declaration was bad on special demurrer, for not shewing with sufficient certainty that the money which the defendant had received and not paid over, was money received by the defendant and his partner as attorneys in the action, under the retainer.

Held also, that the original retainer was not determined by the judgment; but continued afterwards so as to warrant the attorney in issuing execution within a year and a day; or afterwards, in continuation of a former writ of execution issued within that time; and also to warrant his receiving the damages without a writ of execution (*a*).

(*a*) The reader is requested to cancel the marginal note, *ante*, p. 309, and to substitute the above.

4 Dowl. 546

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PARKE, B.—This case was argued before my *Lord Chief Baron*, my Brothers *Alderson* and *Platt*, and myself, in the course of last Michaelmas Term.

The action is on a special contract between the defendant and one Andrew, who are stated to be in partnership as attorneys, and the plaintiff; and it is averred that in consideration, &c. [His Lordship here read the declaration.] To this declaration there is a demurrer, assigning several causes; but the material one is, that it is not alleged that the defendant and Andrew, in receiving the money, acted on the retainer of the plaintiff. Though the declaration would we think, have been good after pleading over, or on general demurrer, it seems to us that it is bad for the cause assigned. The contract declared upon is that made in consideration of the original retainer, by the plaintiff, of the defendant and Andrew to prosecute a suit, in the name of another person, for reward to be paid by the plaintiff; and the defendant and Andrew's promise is to perform and fulfil their duty as attorneys in prosecuting the action for the plaintiff, and in and about recovering damages, and in relation thereto; and the breach meant to be assigned is, the non-payment of the damages after the receipt thereof. Now, what was the duty, in this respect, of the defendant and Andrew, as attorneys in that suit, arising out of the original retainer by the plaintiff? It was that if they received the damages, as attorneys in that suit, under the retainer, they would pay them over, whether to the plaintiff in the present suit, or the nominal plaintiff in that which they brought, does not appear, but to one or the other; it certainly, however, was not a duty flowing out of the original retainer to pay *any money* received *at any time* by them, though as attorneys. Is there, then, a sufficiently certain allegation that the money which they refused to pay over to the present plaintiff, or the nominal plaintiff, was money which was received by them as attorneys in that action under that retainer? It appears to us that there is not, for though we agree that the original retainer is to be

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presumed, primâ facie, to continue as long as by law it might, as argued by Mr. *Prideaux*, on the authority of Lord *Ellenborough's* dictum, in *Brackenbury* v. *Pell* (*a*); and although we think he was right in contending that the original retainer was not determined by the judgment but continued afterwards, so as to warrant the attorney in issuing execution within a year and a day, or afterwards, in continuation of a former writ of execution issued within that time, and also to warrant his receiving the damages without a writ of execution, [the weight of prior authorities (*b*) being against the decision of *Heath*, J., in *Tipping* v. *Johnson* (*c*)]; yet it seems to us that the averment of the receipt of the money is bad for uncertainty. It is stated that the defendant in the original action, being in custody on a ca. sa. paid a sum, being the amount of the residue of the damages, not to the plaintiff, but to the governor of the gaol, who paid it to the defendant and Mr. Andrew, "as such attorneys as aforesaid." This expression is ambiguous; it may mean as attorneys for the plaintiff in that suit, and under the original retainer; or it may mean (as the same expression certainly does in the allegation of the special contract itself) simply as attorneys, or attorneys in co-partnership. In the latter case the averment would be clearly insufficient, and the non-payment to the plaintiff would be no breach of the contract declared upon; and the rule of construction is, that the words are to be taken most strongly against the party pleading. After pleading over, the allegation would be good, for then it would be understood in that sense which would require an answer; so also, on general demurrer; but, as the objection is pointed out on special demurrer, it seems to us that it ought to prevail.

Judgment for the Defendant.

(*a*) 12 East, 585.

(*b*) *Lawrence* v. *Harrison*, Styles, 426. *Roll. Abr.* "*Attorney*," (M), 4, 5. 2 Inst. 378. *Lamb* v. *Williams*; 1 Salk. 89.

(*c*) 2 B. & P. 357.

COURT OF QUEEN'S BENCH.

Easter Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

REGINA *v.* The Recorder of KING'S LYNN.

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An order of removal was drawn up in the following form: "Borough of King's Lynn, in the county of Norfolk;" (in the margin) "Upon complaint of the churchwardens and overseers of the poor of the parish of St. Margaret,

THIS was a rule calling upon the Recorder of the borough of King's Lynn, in the county of Norfolk, to shew cause why a writ of certiorari should not issue to remove into this Court an original order, under the hands and seals of two justices of the said borough, dated the 18th of August, 1845, for the removal of Sarah Wray, widow, and her six children, from the parish of St. Margaret, in the said borough, to the township of Bowling, in the parish of Bradford, in the county of York; and also an order of

in the borough of King's Lynn aforesaid, unto us, whose hands and seals are hereunto set, two of her Majesty's justices of the peace in and for the said borough," &c., that S. W. and her six children, inhabitants of the said parish, "are now actually chargeable to the said parish," "we the said justices, upon due proof made thereof, as well upon the examination of the said S. W. of S. H. and of J. H., upon oath, as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge that the lawful settlement of them the said S. W. and her said children is in," &c. The order concluded in the usual form "Given," &c., without stating where it was made. *Held*, that it sufficiently appeared upon the face of this order:—

First, that the justices were acting within their jurisdiction.

Secondly, that the evidence upon which the justices had proceeded was legal evidence, and that the words "as otherwise," would not be intended to mean evidence not upon oath.

Thirdly, that the adjudication of the settlement was made at the same time and place as, and upon, the hearing of the evidence.

7. 2B. 535.
10 — — 515.

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sessions confirming the said original order, on appeal of the overseers of the said township of Bowling.

The order of removal was in the following terms:

Borough of King's Lynn, } Upon the complaint of the
in the county of Norfolk. } churchwardens and overseers of the poor of the parish of St. Margaret, in the borough of King's Lynn aforesaid, unto us whose hands and seals are hereunto set, two of her Majesty's justices of the peace in and for the said borough, one whereof is of the quorum, that Sarah Wray, widow, and her six children, by her late husband, Robert Wray (that is to say), Robert, aged about twelve years, John, aged about ten years, Mary Ann, aged about six years, Elizabeth, aged about four years, Christiana, aged about two years, and Sarah Ann, aged about seven weeks, now inhabit in the said parish of St. Margaret, not having gained a legal settlement there, and that the said Sarah Wray, and her said children, are now actually chargeable to the said parish of St. Margaret: We, the said justices, upon due proof made thereof, as well upon the examination of the said Sarah Wray, of Sarah Harrison, and of James Hubbard, upon oath, as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge that the lawful settlement of them the said Sarah Wray, and her said children, is in the township of Bowling, in the parish of Bradford, in the county of York. We do, therefore, require you the said churchwardens and overseers of the poor of the said parish of St. Margaret, or some one of you, to convey the said Sarah Wray, and her children, from and out of your said parish of St. Margaret to the said township of Bowling, and to deliver them to the churchwardens and overseers of the poor there, or to some or one of them, together with this our order, or a true copy thereof, at the same time shewing to them the original. And we do hereby require you the said churchwardens

and overseers of the poor of the said township of Bowling, to receive and provide for them as inhabitants of your township.

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Given under our hands and seals this 18th day of August, in the year of our Lord 1845.

(Signed) ROBERT PILCHER, Mayor, (L. S.)
JOHN WAYTE, (L. S.)

The following objections were stated to this order: First, that it does not appear that the justices, when making it, were acting within their jurisdiction. Secondly, that it appears that the justices have received evidence which was not upon oath. And, thirdly, that the adjudication or inquiry into the place of settlement of the paupers did not proceed upon any proper evidence.

Palmer now shewed cause. It is submitted that it sufficiently appears upon the face of this order that the justices acted within their jurisdiction. In the margin of the order there is "Borough of King's Lynn, in the county of Norfolk," and the complaint is stated to be made by "the churchwardens and overseers of the poor of the parish of St. Margaret, in the borough of King's Lynn aforesaid, unto us, two of her Majesty's justices of the peace in and for the said borough, one whereof is of the quorum." It will, therefore, be taken to be made in the place mentioned in the margin, namely, the borough of King's Lynn. The case of *Reg.* v. *The Inhabitants of Casterton* (*a*) is in point. There an order of removal had in the margin the words "Westmoreland to wit," and proceeded: "To the overseers of the poor of the township of K., and to the overseers of the poor of the township of C. in the said county. Whereas you, the overseers of the poor of the township of K., have made complaint unto us whose names are hereunto set and seals affixed, being two of her Majesty's justices of

(*a*) 6 Q. B. 507.

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the peace and quorum in and for the said county," &c. The rest of the order was in the usual form, and did not further state the county in and for which the justices acted. And it was held that the jurisdiction sufficiently appeared by reference to the margin, which was part of the order for that purpose. In the late case of *Reg.* v. *The Inhabitants of Stockton* (*a*), the words descriptive of jurisdiction were, "unto us," "two of her Majesty's justices of the peace for the said borough," omitting the word "in." And the Court held that the word "in," when used in the phrase of "in and for the said county," was descriptive of the locality in which the order was made; for otherwise it would be mere surplusage; and therefore held that its omission was fatal. *The King* v. *Austin* (*b*) decides that an order of sessions to suppress an alehouse, must state the county in which the alehouse is situated; and the reason given, in the marginal note to that case is, because "the county in the margin refers only to the place where the order was made." [He referred also, on this point, to *Hale's Pleas of the Crown*, vol. 2, ch. 23, s. 1.] As to the second objection, it is submitted that the words "upon due proof made thereof, as well upon the examination of the said Sarah Wray, of Sarah Harrison, and James Hubbard, *upon oath*, *as otherwise*, and likewise upon due consideration had of the premises" are sufficient. In 2 *Nolan's Poor Laws*, 222, 3 (4th ed.), it is said, "If the order profess to be made 'upon due examination,' without saying 'upon oath,' it is sufficient; for, in an order, it shall be intended to be upon oath." "So if it profess to be made 'upon examination of the premises upon oath, and other circumstances,' it is sufficient." *Rex* v. *Bagworth* (*c*) is there referred to as an authority, and that case will be found to be precisely in point with the present. There the words were "upon examination of the premises upon oath and other circumstances," and the Court held

(*a*) 2 Car., Ham. & Allen's New Sess. Cases, p. 16.

(*b*) 8 Mod. 309, 5th ed., by Leach; S. C. 2 Ld. Raym. 1406.

(*c*) Cald S. C. 179.

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them sufficient. [*Coleridge*, J.—*The King* v. *Luffe* (*a*) is a similar case. There the order, which was a bastardy order, purported to be made "upon examination of the cause and circumstances of the premises, as well upon the oath of the said Mary Taylor, *as otherwise;*" and Lord *Ellenborough*, in giving judgment, says, "It is true that it is not said, 'as otherwise *upon oath*;' but as no evidence can properly be given otherwise than upon oath, it is not going further in making an intendment to support this order than has been done in other cases, to say that such other evidence must also be taken to have been given upon oath."] It is only by intendment that the Court can say there was any other evidence given than that upon oath; and if the Court are to make any intendment, they will do so in favour of the order, and to support it; *Rex* v. *Aire and Calder Navigation* (*b*); *Rex* v. *Farringdon* (*c*); *Rex* v. *Kempson* (*d*); *The King* v. *Glossop* (*e*). [He referred also, on this point, to *Rex* v. *Daman* (*f*).] As to the third objection, that it does not appear that the adjudication of the settlement was founded upon any evidence on oath at all, it is submitted that the whole order must be read together, and that it then sufficiently appears that it was made upon the evidence before recited. The case of *The King* v. *Crisp* (*g*) shews that the Court will read the whole order together, and it will then sufficiently appear that the adjudication of the settlement proceeded upon the hearing of the evidence before recited.

Dundas and *Metcalfe*, in support of the rule. As to the first objection, the question is, whether it be shewn on the face of the order that being justices "in and for" the borough of King's Lynn, they not only heard the complaint of the woman there; but also proceeded to make the adju-

(*a*) 8 East, 193.
(*b*) 2 T. R. 660.
(*c*) 2 T. R. 466.
(*d*) 1 Cowp. 241.
(*e*) 4 B. & A. 616.
(*f*) 1 Chit. Rep. 147; S. C. 2 B. & A. 378.
(*g*) 7 East, 389.

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dication "in" the borough. It is quite consistent with the terms of this order that they may have heard the complaint of the woman "in" the borough, and afterwards have gone out of the borough and made their adjudication. *Regina* v. *The Inhabitants of Casterton* (*a*), which has been relied on by the respondents in the course of the argument, was decided upon a totally different point to the one here, as appears from the commencement of the judgment of the Court as delivered by Lord *Denman*, who said, "The principal question in this case is, whether the justices making the original order of removal appear upon the face of it to have jurisdiction; or, in other words, whether they are stated with sufficient certainty to be justices of and for the county in which the removing township is situate." As to the case of *The Queen* v. *The Inhabitants of Stockton* (*b*), there was nothing there decided except that the words "justices of the peace *for* the said borough" were insufficient. Whether if the word "in" had also been inserted it would have been sufficient, was a point beside that case, and the dicta on which were therefore extra-judicial. As to what has been said respecting the words "Borough of King's Lynn," in the margin, that would only aid the defect, if reference were made to it in the body of the order itself; as if it had been said, "Given," &c. "at," &c. "in the borough aforesaid." The order should have stated at the end where it was made, in conformity with the forms in the books of practice. In *Archb. Just. of the Peace*, vol. 3, p. 528, (3rd ed.), the form there given concludes thus: "Given under our hands and seals this" &c., "*at*," &c. In *Child's* case (*c*), an indictment was stated to be found "apud generalem sessionem pacis tent. apud Blandford;" and it was held bad for not stating "in comitatu prædicto." To the same effect is *Ludlow's* case (*d*), and also the case of *Hamond* v. *The Queen* (*e*).

(*a*) 6 Q. B. 507.
(*b*) 2 Car., Ham. & Allen's New Sess. Cases, p. 16.
(*c*) 1 Cro. Eliz. 606.
(*d*) Id. 738.
(*e*) Id. 751.

These authorities shew that in an indictment there is no intendment that any thing is done within the county mentioned in the margin, unless there be express reference to it. And in a civil case it is clear that the venue in the margin is merely inserted as, a direction where the cause is to be tried. [*Palmer* referred to *Reg.* v. *Sydserff* (*a*), where it was held to be no objection to a motion to estreat a recognizance that the justice of peace, before whom it was taken, was described as a justice of the peace "in and for the county of Surrey," whilst the county in the margin was Middlesex.] In that case all that the Court did was to decline deciding in favour of the objections, which they said might be urged in another place; the motion then before the Court, being but a preliminary step to further proceedings. As to the second point, it is true that the case of *Rex* v. *Luffe* (*b*) is against the validity of the objection; but there is a later case of *Regina* v. *Wroth and Another* (*c*), where an order in bastardy, stating, "and we having in the presence," &c. "heard the evidence of such woman upon oath, and such other evidence as she hath produced, and having also heard the said Thurston Earthrowl by his attorney; and the evidence of the said Mary Stilton, the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction," was held bad for not stating "the other evidence" to have been upon oath. [*Coleridge*, J.—In that case, *Rex* v. *Luffe* (*b*), was not referred to. That decision has always been considered as good law.] In *Rex* v. *Luffe*, the wife was clearly incompetent to prove the fact of non-access. That evidence, therefore, being illegal, the "other evidence" was probably on that ground construed to mean "legal evidence;" whereas here the evidence of the woman being good evidence of the settlement, the other evidence received must be taken to be illegal evidence. The passage in 2 *Nolan's Poor Law*, p. 222,3 (4th ed.), which has been cited,

(*a*) *Ante*, vol. 2, p. 564.
(*b*) 8 East, 193.
(*c*) *Ante*, vol. 2, p. 729.

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is founded upon the case of *Rex* v. *Bagworth* (*a*); but it appears, upon referring to that case, that the decision there proceeded upon another ground, namely, that it was not necessary to state that the pauper herself had been examined. As to the third objection, the question is whether the Court will intend that the adjudication of the settlement was made upon the before recited evidence, or whether it was made upon any evidence at all. The case of *The King* v. *Stepney* (*b*) shews that the Court will put no other construction on an order than what the terms of it plainly import. [*Carrow*, amicus curiæ, referred to *Regina* v. *Rotheram* (*c*), where a similar objection was urged, and overruled.] The point, however, was not much pressed in that case.

COLERIDGE, J.—I think that this rule ought to be discharged. With respect to the two last points, the Court seems to be concluded from entertaining them by the authorities which have been cited. To adopt an inverse order, and to take the last objection first, the case of *Regina* v. *Rotheram* (*c*) appears to me to be in point. There a similar objection was raised, and although it is said that it was not much pressed, I think that that could only be because the counsel making it, felt it to be untenable. Besides, I see that two of the Judges, in the course of the argument, referred to the form given in *Archbold's Justice of the Peace* (*d*), and to that in *Burn's Justice* (*e*), which is a work of considerable authority, as shewing that in those works no greater particularity was thought necessary to be used. And Lord *Denman*, in delivering the judgment of the Court remarks that with respect to the objections in point of form, which had been urged to the order, the Court had given sufficient answer to them in the course of the argument, and did not think it necessary to repeat

(*a*) Cald. S. C. 179.
(*b*) Burr. S. C. 23.
(*c*) 3 Q. B. 776; S. C. 2 G. & D. 523.
(*d*) Vol. 3, p. 513, 2nd ed.
(*e*) Vol. 4, p. 1158, by D'Oyly and Williams.

them; and his Lordship goes on to say, "We certainly should not be induced, upon slight grounds, to overturn a form of proceeding which we have reason to believe has been established by the usage of very near a century."

With respect to the second point, unless this case could be distinguished from that of *Rex* v. *Luffe* (*a*), it must be governed by that decision. It is said, however, that the subsequent case of *Regina* v. *Wroth and Another* (*b*) is at variance with that decision. The case of *Rex* v. *Luffe* was, however, not brought before the notice of the Court in the latter case, or no doubt the Court would have decided in accordance with it. A distinction, however, has been attempted to be drawn between the present case and that of *Rex* v. *Luffe* (*a*), on the ground that there the wife's evidence being clearly incompetent as proof of the fact of non-access, it would be presumed that the "other evidence" meant legal evidence; whereas the evidence of the woman here being legal, the "other evidence" would be presumed to be otherwise. But, as in *Rex* v. *Luffe* (*a*), the wife was competent to prove the fact of adulterous intercourse, and Lord *Ellenborough* says that the Court would intend "that she was examined only as to those facts which she was competent to prove, and that the rest of the case was proved by the other evidence," I can see no ground for this distinction, particularly as it must be borne in mind that the justices considered that they had heard only good evidence. This objection must therefore also fail.

With regard to the remaining objection, the same answer applies that this order is in the usual form; and although it is said that a difference exists in the later precedents, which contain a statement of the place *where*, as well as the time *when* the order is made, that may only arise from an extreme care to avoid the possibility of such an objection being taken. If the Court, however, say, in the case above referred to, that they are unwilling to overturn a form of proceeding which has been established by the usage of so many years: à fortiori, should a single Judge sitting alone

(*a*) 8 East, 193. (*b*) *Ante*, vol. 2, p. 729.

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avoid doing so. I think, however, that the jurisdiction sufficiently appears on the face of this order. The order runs thus: "upon the complaint of the churchwardens and overseers of the poor of the parish of St. Margaret, in the borough of King's Lynn aforesaid, unto us, whose hands and seals are hereunto set, two of her Majesty's justices of the peace in and for the said borough," &c., I think that no one can doubt that here the complaint was made to the justices then being within the borough, and acting as justices in the borough. It is agreed that if we are to intend nothing for, we are at the same time to intend nothing against, the order. It goes on to say, "we, the said justices, upon due proof made thereof, as well upon the examination," &c. "as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge that the lawful settlement of," &c. "is in the township of," &c. Now, it is said, that there is nothing here to shew that the justices, after receiving the complaint within the borough, did not go out of the borough to make the order. But the answer is that that would be making an intendment against the order; whereas, I think, that the natural construction of the words, without any intendment at all, is that the justices made the order at the same time and in the same place where they heard the complaint. The rule must therefore be discharged, and as the order follows the form in common use, with costs.

Rule discharged, with costs.

GURNEY *v.* GURNEY and CHAPMAN.

Notice of trial having been given for the first sittings in Term, the 16th of April, the defendant obtained a rule for a special jury on the 9th, which he served on the plaintiff on the 13th. The Master's office was closed on the 10th for the holidays, and remained so till the 15th, on which day the defendants served another copy of the rule on the plaintiff, together with an appointment to nominate the jury on the 18th. *Held* that the defendants had been guilty of no laches; and the Court therefore refused to discharge the rule for a special jury.

THIS was an action against the defendants as acceptors of a bill of exchange; and issue having been joined, notice

of trial was given for the first sittings in this Term (the 16th of April). On the 9th of April, the defendant, Chapman, obtained a rule for a special jury, which he served on the plaintiff on the 13th. It appeared that the 10th of April was Good Friday, on which day the Master's office was shut, and continued closed during the holidays, which ended on the 15th. On that day another copy of the rule was served on the plaintiff, with an appointment to nominate the jury on the 18th. It was sworn by the defendant, Chapman's attorney, that the rule for a special jury was not obtained for the purposes of delay.

A rule having been obtained on the 16th of April, to discharge the rule for a special jury,

Willes shewed cause. The defendant has been guilty of no laches; for the practice is not to serve the rule until an appointment has been obtained; and as the Master's office was shut on the day following that on which the rule was granted, it was impossible to get an appointment made till the 15th, when the office re-opened. By Reg. Gen., Hil. Term, 1 Vict. r. 3, it is ordered, that where a notice of trial is given for any day, a rule for a special jury on behalf of a defendant, or a plaintiff in replevin, shall not be granted, "unless such application is made for it more than six days before that day." Here the rule was obtained more than six days before the day of trial; and it is not the defendant's fault that, by reason of the holidays intervening, he was unable until the 15th to obtain an appointment to nominate the jury. Besides, the plaintiff has been in no way damaged by the delay, as no special jury causes are tried at the sittings in Term; and therefore it is difficult to see on what ground the plaintiff seeks to support the present rule.

The Court called upon

Lush to support the rule. The object of the Reg. Gen., Hil. Term, 1 Vict. r. 3, would be defeated if the defendant might defer the service of the rule until too late for the

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plaintiff to proceed to trial at the same sittings for which he has given notice. The defendant must be taken to have known of the Easter holidays, and should have either obtained his rule earlier, or at least have served it on the same day that it was granted. The case of *Phelps* v. *Keily* (*a*) is very similar to the present one. There the defendant had obtained a rule on the 11th of January, and did not serve it till the 15th, and the Court discharged this rule, saying, that a defendant "must shew, by the diligence which he uses, that he is really desirous of his cause being tried by a special jury." [*Wightman*, J.—Supposing the defendant had served the rule on the 9th, would the plaintiff have been more advanced by it than he is now?] The same objection would apply in the case cited. There the rule was only obtained on the first day of Term, and no special jury causes are tried at the sittings in Term. [*Wightman*, J.—In the case cited the defendant did not serve the rule till four days after it was obtained; and there is no actual impossibility that a special jury case should be heard in Term: whereas here the offices were closed, and no steps whatever could be taken, either to strike the jury or to issue a distringas.]

WIGHTMAN, J.—I do not think that the defendant has been guilty of any irregularity. The whole doctrine of laches is founded on this: that the opposite party has suffered some injury from the other's neglect. That is not the case here; and I therefore think that the present rule must be discharged.

Rule discharged (*b*).

(*a*) 4 Scott, N. R. 376; S. C. 3 M. & G. 883; 1 Dowl. 501, N.S.

(*b*) Without costs. The attention of the Court was not called to the rule Reg. Gen., East. Term, 2 Wm. 4, s. 1, which orders "that the days between Thursday next before, and Wednesday next after Easter day, shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trials and notices of inquiry in any of the Courts of Law at Westminster."

1846.

Ex parte LOWE.

BEADON applied for a rule, calling on the justices of the peace for the county of Worcester, to shew cause why a mandamus should not issue directed to them, commanding them to enter continuances, and hear an appeal against an order, under the hands and seals of two of her Majesty's justices of the peace for the said county: whereby one James Lowe was adjudged to be the putative father of a bastard child, born of the body of one Mary Owens; and ordered to pay a certain weekly sum for its maintenance.

It appeared from the affidavit, in support of the motion, that the order in question was made on Saturday, the 14th of March 1846, when notice of appeal was given, and recognizances entered into by the putative father, in pursuance of 7 & 8 Vict. c. 101, s. 4 (*a*). Notice of the recognizances having been entered into, was, in pursuance of the

The 8 & 9 Vict. c. 10, s. 3, requires notice of the entering into recognizances to try a bastardy appeal, to be "forthwith" given to the mother of the child, and it also provides that the sending such notice by post shall be sufficient: *Held*, that the sessions were right in refusing to hear an appeal, where an interval of seventeen days had been suffered to elapse between the entering into the recognizances and serving the notice on the mother; although it was shewn that the delay that had occurred, was owing solely to the appellant having sought to effect a personal service on the mother.

23-29-Pd-122. (m.c)

(*a*) Sect. 4. "That the justices in petty session as aforesaid may adjourn the hearing of the case as often as to them may seem fit; but no such order shall be made unless applied for at such petty sessions within the space of forty days from the service of the summons after the birth of the bastard child on the person alleged to be the father of such bastard child; and if within twenty-four hours after the adjudication and making of any order on the putative father as aforesaid such putative father give notice of appeal to the mother of the bastard child, and also within seven days give sufficient security, by recognizance or otherwise, for the payment of costs, to the satisfaction of some one justice of the peace, it shall be lawful for such putative father to appeal to the general quarter sessions of the peace to be holden after the period of fourteen days next after the making the said order for the county, city, borough, or place for which such petty session may have been held; and the justices in such quarter sessions assembled, or the recorder, as the case may be, shall thereupon hear and determine such appeal, and shall order such costs to be paid by either party as to them or him may seem fit."

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8 & 9 Vict. c. 10, s. 3 (*a*), on Monday, the 16th, given to a person to serve on the mother of the child. He attempted to serve her personally on the 19th; but was unable to find her. He made several other unsuccessful efforts on the 21st, 25th, and 28th of the same month. On the 31st, however, he succeeded in finding her and serving her personally with the notice. On the case being called on at the sessions, a preliminary objection was taken, that as the act of Parliament required the notice to be given "forthwith," its provisions had not been complied with by the above service, and that therefore the appeal could not be heard. The sessions were of opinion that the objection was a fatal one, and accordingly refused to hear the appeal.

Beadon now urged that the word "forthwith" must be construed liberally, and must mean within a reasonable time, according to the circumstances. He referred to *The Queen* v. *The Justices of Worcester* (*b*). There a statute which required that recognizances should be entered

(*a*) Sect. 3. "'And whereas power is given by the said act to the putative father to appeal against an order made upon him by the justices in petty session assembled, giving notice of appeal as therein specified, and also sufficient security, by recognizance or otherwise, for the payment of costs, to the satisfaction of some one justice of the peace;' be it enacted, that the condition of any such recognizance shall be for the appearance of the said putative father at such general quarter sessions of the peace as is required by the said act, and his trial of the appeal thereat, and the payment of such costs as he shall be then and there ordered to pay; and that in respect of any order to be made after the passing of this act the party entering into any such recognisance shall forthwith give or send a notice in writing of his having so entered into such recognizance to the woman in whose favour the said order shall have been made, and unless he shall enter into the recognizance before one of the justices who shall have made the order, to one at least of such justices; and in default of his giving or sending such notice or notices as aforesaid the appeal shall not be allowed: provided that the sending of such notice or notices by the post shall be taken to be sufficient."

(*b*) 7 Dowl. 789.

1846.

Ex parte Lowe.

into "forthwith" after notice of appeal, was held to mean that they should be entered into "within a reasonable time." It is true that in that case a delay of nine days was held too long; but there was no cause assigned for the delay. Here it is shewn that the delay occurred simply from the anxiety to effect a personal service.

COLERIDGE, J.—I think that the sessions acted quite right in refusing to hear this appeal, and that there must consequently be no rule. The act of Parliament says, that the party entering into the recognizance shall "forthwith" give notice of his having done so to the mother of the child. Now, without putting any critical construction on the word "forthwith;" it means, I think, with as little delay as the circumstances will reasonably admit of. Here a considerable time is suffered to elapse, which appears to have been owing to the difficulty of serving the mother personally with the notice. But this it was not necessary to do; for the same section that requires the notice to be given, expressly provides "that the sending such notice or notices by the post shall be taken to be sufficient." The party might have given this notice by the post. He, however, did not choose to do so, but would content himself with nothing less than a personal service. The act does not require a personal service, and therefore a service by leaving it at the dwelling-house of the woman would perhaps have been sufficient. I think that the interval that was thus suffered to elapse from the 14th to the 31st was too long; and, as it was unnecessary, that there must be no rule.

Rule refused.

1846.

AUSTER *v.* HOLLAND.

An action was brought by a wife against her husband, on a settlement deed, in the name of the trustee under that deed. The Court refused, on the application of the defendant, to set aside the proceedings, on the ground that the action was brought without the authority of the trustee; it appearing that an application had been made to the trustee to consent to her name being used, and an indemnity against costs offered to her, which she had refused, without assigning any reason.

THIS was a rule obtained by the defendant, which called upon the plaintiff, and Messrs. Mitton and Nealor, her attorneys, to shew cause why the writ of summons in this cause, and all subsequent proceedings, should not be set aside.

From the affidavit, in support of this motion, it appeared that a writ of summons was issued in the above cause by Messrs. Mitton and Nealor, as attorneys for the plaintiff. That the plaintiff herself had stated that she had never given any authority to Messrs. Mitton and Nealor to commence the action, and that it was carried on without her consent. There was a denial of any collusion between the plaintiff and the defendant.

From the affidavits, in answer, it appeared that the action was brought to recover certain monthly payments, secured to a Mrs. Holland, under a deed of separation from her husband, who was the defendant in the action. That the plaintiff, Sarah Auster, had been appointed trustee under the deed, but had refused to act. It was suggested that the defendant, in neglecting to fulfil the terms of the deed by making these payments, mainly relied on the refusal by the plaintiff to execute the trusts. It appeared from several letters which had passed between the parties, and which were set out in the affidavits, that various applications had been made to the defendant to make these payments without success; and that on one occasion he had stated that he had already tendered the amount due. That Sarah Auster was the only trustee named in the deed, and that consequently Mrs. Holland, in seeking to enforce these claims against her husband, was obliged to use her name. That a letter had been written requesting permission to do so, and informing the plaintiff that Mrs. Holland's father had agreed to give an indemnity against any costs that might be incurred in the action; but that the plaintiff had refused her consent to her name being used. It was also

charged that collusion was believed to exist between the plaintiff and the defendant, to deprive Mrs. Holland of the only means in her power of enforcing these claims.

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Lush shewed cause. Here the action is brought, and the authority to commence it given, by the person who is really entitled to the money, the payment of which is thus sought to be enforced. And it is brought in the name of the trustee, who is no more interested than by being the only party in whose name an action can be legally maintained. All the interest the trustee can have is that she should be indemnified against any costs that may be incurred in the prosecution of the action; and an offer to that effect has been made to her and rejected. She, therefore, can have no motive in refusing to allow her name to be used, except that of assisting the defendant to defeat this action. Had she adopted the more active step of giving the defendant a release of the action, this Court would, in the exercise of its equitable jurisdiction, have prevented the defendant from pleading it. The defendant, however, can have no right to make this application: it should come, if at all, from the plaintiff herself. The case of *Chambers* v. *Donaldson and Others* (*a*) is in point. There, a feme covert living apart from her husband under sentence of separation, with alimony allowed, pendente lite, in the Ecclesiastical Court, had brought trespass in the name of her husband against certain wrongdoers for breaking and entering her house, and taking her goods; and the Court refused, on the application of the defendants, to stay the action, though supported by an affidavit of the husband that the action was brought without his authority. That case is even stronger than the present; for here an indemnity has been offered. Lord *Ellenborough*, in delivering the judgment of the Court, there says, "If the subject of the complaint were only that the husband was made liable to

(*a*) 9 East, 473.

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the risk of costs without his consent, we should have taken care, upon a proper application, to have secured his indemnity. But it is evident that this is an application by the defendants, colluding with the husband, to protect their own wrong, by defeating the action in the only form in which, under the unfortunate circumstances of the case, the wife can protect herself; and we will not lend our discretionary aid to the defendants to divert those legal forms, which are framed for the furtherance of justice, to the purpose of defeating it." The case of *Spicer* v. *Todd* (*a*) is an authority to the same effect. There the assignee of an insolvent debtor had brought an action against the tenant of premises, in which the insolvent had a life interest, in the names of the trustees of those premises; but the Court held that he could not do so, unless he shewed that he had their consent, or had offered them a sufficient indemnity; and a Judge, at Chambers, having set aside the proceedings for irregularity, the Court made absolute a rule to rescind that order, on the assignee giving the plaintiffs an indemnity to the satisfaction of the Master.

The Court called upon

Gray to support the rule. Mrs. Holland has no right to use the plaintiff's name without her consent. It may be, and very often is, a matter of discretion with a trustee whether or not to bring an action; and this Court will not interfere with that discretion, unless a clear case of fraud and collusion be made out. In the present instance no such case has been made out. Supposing a verdict were to pass against the defendant in the present action, and he were to pay the amount to the attorneys who are bringing the action without the plaintiff's consent; that would be no answer to an action by the plaintiff herself, brought with her consent. The case of *Robson* v. *Eaton* (*b*) shews that payment to an attorney who is suing in the

(*a*) 2 Cr. & J. 165; S. C. 1 Dowl. 306. (*b*) 1 T. R. 62.

name of a plaintiff, without his authority, is no answer to an action by the plaintiff himself. It is no objection that this motion is made by the defendant instead of the plaintiff. The same point was taken in *Hubbart* v. *Phillips* (*a*), and the Court there decided against it.

COLERIDGE, J.—I am of opinion that this rule must be discharged. It is an application made by the defendant in the action, to set aside the writ of summons and all subsequent proceedings, on the ground that the action is brought without the authority of the plaintiff. The answer to this application is founded on an alleged collusion between the plaintiff and the defendant to deprive the wife of the latter of the benefit of a deed of separation, of which the plaintiff is trustee, and to enforce which the present action is brought; and I think that looking at the facts themselves rather than at the statements made, there can be little doubt that there exists such collusion. The plaintiff cannot fail to know that except by using her name, the wife has no legal remedy; and yet she does not choose to give any reason for refusing to permit her name to be used. The only construction that can be put upon such conduct is, either that she is actuated by a hostile feeling towards the wife of the defendant, or by a friendly feeling towards the defendant himself. She has been offered an indemnity against costs, which she has refused to accept; and therefore it cannot be said that there is any hardship upon her, by exposing her to the liability of costs, in going on with this action. If she really object to these proceedings, she can make an application to the Court to stay them, or for security for costs. Looking, therefore, at all the circumstances, I think this rule must be discharged; and as all the facts were not stated in the affidavit on which the rule was moved, it must be discharged with costs.

Rule discharged, with costs.

(*a*) 13 M. & W. 702; S. C. *ante*, vol. 2, p. 707.

1846.

VERNON *v.* POUNCETT.

In an affidavit for a distringas to proceed to outlawry, it should appear that a copy of the writ of summons has been left at some place, where it is probable that being so left, it may come to the defendant's knowledge.

WORDSWORTH applied for a distringas for the purpose of proceeding to outlawry.

It appeared from the affidavit, that the house of the defendant was unoccupied and shut up, and that, on application to a house agent to whom reference was made by a bill announcing the house to be to let, he stated, that the defendant was owing a large sum for rent, and had gone abroad, and that he believed the defendant had gone abroad on purpose to avoid his creditors; that application had also been made to an attorney who was the trustee and professional adviser of the defendant, who had stated that he had no authority to accept process, or to appear for the defendant.

The question was, whether the affidavit should shew that a copy of the writ of summons had been left at the house of the defendant, or with the attorney.

Wordsworth submitted, that it could only be necessary to leave a copy of the writ of summons where there was some probability that on being left it would come to the hands of the defendant. From inquiries made as to the practice in the Court of Exchequer, although the question had not been there raised, the officers of that Court seemed to think that such would be the proper rule to be adopted. In the present case there could be no use in leaving it either at the house of the defendant, or with the attorney, under the circumstances.

WIGHTMAN, J.—The Master informs me that generally a copy of the writ of summons should be left; and that if there be such a person as a trustee or professional adviser of the defendant, it should be left with him. Under particular circumstances, it is possible that such a service might be dispensed with; but I do not see that any such occur in the present case.

Rule refused.

1846.

REGINA *v.* The Justices of MIDDLESEX.
(St. Pancras *v.* St. John, Hackney.)

THIS was a rule calling upon the justices of Middlesex to shew cause why a writ of mandamus should not issue, directed to them, commanding them to enter continuances and hear an appeal by the churchwardens and overseers of the poor of the parish of St. Pancras, in the said county, against an order under the hands and seals of two of the justices of the said county, bearing date the 5th of Feb., 1845; whereby Ann, the wife of Joseph Robins, and her three children, were removed from the parish of St. John, Hackney, to the parish of St. Pancras, both in the said county.

It appeared from the affidavits that an order of removal of Ann Robins and her three children was made on the 5th of February, 1845, by William Henry Aspinall, and *Josiah Wilson*, two of her Majesty's justices of the peace in and for the county of Middlesex; and that on the 18th of the same month, a copy of the order and of the examinations was sent to the appellant parish. A petition of appeal (according to the practice of the Middlesex Sessions) was afterwards presented, in which the order was described as one made by William Henry Aspinall, and *Jonah Walter*. In the copy of the order which had been served, and which was attached to the affidavit, the name of the first magistrate was easy to be read, but that of the second was almost illegible. In the copy of the examinations, however, it was legibly written. When the appeal was entered at the April sessions, it appeared to be against an order made by William Henry Aspinall and *John Walter*; the clerk of the sessions finding that there was no justice of the name of *Jonah* Walter, having altered it to *John* Walter. Notice of appeal was given on the 30th of June, in which the order was described as made by William Henry Aspinall and *John Walter*. On the appeal coming on to be tried at the

Where the name of one of the justices signing an order of removal was so illegibly written in the copy of the order sent to the appellant parish, (although legible enough in the copy of the examinations,) that the parties gave their notice of appeal as against the order of A. B. and *Jonah Walter*, instead of A. B. and *Josiah Wilson*, (the real name of the justice) and the appeal was entered at the sessions, as against the order of A. B. and *John Walter*; and the sessions refused to entertain the appeal, on the ground of the misdescription: this Court granted a mandamus, compelling them to enter continuances and hear the appeal.

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sessions, it was objected that there was no such order as that appealed against, as there was no order signed by William Henry Aspinall and *John Walter*; and the sessions holding the objection fatal, refused to hear the appeal.

Montagu Chambers shewed cause against the rule. The sessions acted rightly in refusing to hear this appeal, as upon the face of the notice and entry of appeal, it appeared to be made by another party than the one on the files of the sessions, and therefore to be a different appeal. The case of *Regina* v. *The Justices of Denbighshire* (*a*), will, perhaps, be relied on in support of this application. There a notice of appeal having described the order of removal as made by R. H. Cundy, and another magistrate, instead of B. Cundy, there being two magistrates in the county, whose respective Christian names commenced with those initials, and the sessions having refused to hear the appeal on the ground of the variance, this Court granted a mandamus compelling them to hear the appeal. In that case, however, the only mistake was in the notice of appeal. There cannot be a mandamus to enter continuances and hear an appeal against an order of removal which does not exist. The appellants have only themselves to blame, for the name was written clearly enough in the copy of the examinations which was sent.

Crowder, in support of the rule. The question is, whether the sessions ought not to have heard this appeal. The mistake here could not have misled, and when the difficulty of deciphering the copy of the order is taken into account, was no very gross piece of negligence.

COLERIDGE, J.—I think the rule in this case must be made absolute. The Master suggests, that the rule should be so moulded that the appellants should be at liberty to

(*a*) 9 Dowl. 509.

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enter an appeal now against the real order by Mr. Wilson. I do not, however, think that it is necessary to do so, as I have no doubt that the sessions will have proper jurisdiction to hear this appeal, if they are satisfied that the order has, in point of fact, been made, and notice of appeal entered against it, though a mistake may have occurred in the name. It is said, that the notice of appeal was not given against this order. That, however, is a question of fact, and I think it was competent to the sessions to ascertain the intention of the parties; and to do so, they would exercise a proper discretion in looking at the document itself, and if they found that the signature to the copy served was so written that no two persons could agree as to what the signature was, they might fairly come to the conclusion, that the appeal was meant to be entered against the order before them, and therefore that they had jurisdiction to hear it.

Rule absolute (*a*).

(*a*) See *Regina* v. *The Justices of Oxfordshire*, 4 Q. B. 177.

WILKINS *v.* JONES.

CORRIE moved for a distringas to compel an appearance. The difficulty in this case is that the affidavit does not state that it is believed that the defendant is keeping out of the way to avoid service of the writ of summons; but it is submitted that the following facts, which appear upon the affidavit, form a sufficient reason why such a statement cannot be made. The affidavit states that on the 21st of March last, the deponent called at the place of residence of the defendant, and informed the housekeeper of the defendant, whom he saw there, of the nature of his business: that she said that the defendant was at home and

Where calls had been made at the residence of the defendant, and answers given; on one occasion, that he was at home and ill, and could not be seen; and on another, that he was at home and could not be seen; and it was sworn that it was believed that the defendant was

bedridden, and had been confined to his house for many years; the Court granted a distringas to compel an appearance, without the usual statement in the affidavit, of a belief that the defendant was keeping out of the way to avoid service.

11 - C13. 602.

1846.

WILKINS v. JONES.

asleep, but could not be seen. That he called again at three o'clock on the 24th, and saw the housemaid of the defendant, who informed him that her master was at home, but ill. That he fixed the following day at four o'clock, when he again saw the housekeeper, who said that her master was at home, but could not be seen. That, on the last occasion, he left a copy of the writ of summons with her. And that, from the answers he received on these occasions, he believes that the defendant was at home, though he was not allowed to see the defendant; and that he has been informed and believes that the defendant is bedridden, and has been confined to his house for many years.

COLERIDGE, J.—I think that the facts disclosed are sufficient for a distringas. There is a good reason why the party making the affidavit cannot swear to a belief that the defendant is keeping out of the way.

Rule accordingly.

In re RAMSDEN.

A warrant of commitment of a bankrupt for not giving satisfactory answers,

THIS was a rule calling upon William Burge, Esq., one of her Majesty's commissioners in bankruptcy, acting under a fiat issued against James Ramsden; and upon the official recited the issuing of a fiat "directed to her Majesty's Court of Bankruptcy for the Leeds district" against J. R.; and that J. R. duly surrendered "to M. J. West, Esq., one of the commissioners of the said Court authorized to proceed with the said fiat." It then stated several examinations before M. J. W. Esq., after "being duly sworn," and proceeded thus; "And whereas the said J. R. did, on," &c. "pursuant to a summons issued by me at the request," &c. "of the assignees," &c., "appear before me the commissioner then acting in the prosecution of the said fiat," "to be examined," &c. "And I, W. Burge, Esq., the said commissioner, in execution of the powers," &c., "proceeded to examine the said J. R.," &c., "and the said J. R. being then duly sworn and required before me to make true answers," &c. The warrant then set out several questions and answers, and other adjournments and examinations, where the bankrupt was stated to be "duly sworn;" "which answers not being satisfactory," &c., "these are therefore," &c. "Given," &c. "at the Court of Bankruptcy for the Leeds district," &c. Signed, "W. Burge, commissioner," (L. S.) *Held*, on motion for a habeas corpus, that the warrant was bad, as shewing that the bankrupt was sworn on his examination, contrary to the 8 & 9 Vict. c. 48, s. 1.

A warrant of commitment for non-payment of a poor rate should shew an adjudication by the same justices before whom the complaint is heard.

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and trade assignees under, and the solicitor to, the fiat; J. D. Luccock, D. W. Nell, R. Markland, and J. R. Atkinson, Esquires, four of the keepers of the peace and justices in and for the borough of Leeds; the overseers of the poor, and the surveyors of the highways of the respective townships of Armley and Wortley in the same borough; the sheriff of the county of York, and the keeper of the gaol of the castle of York; to shew cause why a writ of habeas corpus should not issue, to bring up the body of the said James Ramsden, &c.: or why the said James Ramsden should not be discharged out of custody, as to his commitment by virtue of a warrant of the said William Burge, Esq.; and also as to his commitment by virtue of four other warrants respectively made by one or more of the said justices, without issuing the said writ.

The warrant of commitment by the Commissioner of Bankrupts was as follows:

"In the Court of Bankruptcy for the Leeds district," &c.

"Whereas a fiat in bankruptcy," &c., "directed to her Majesty's Court of Bankruptcy for the Leeds district, was duly issued against James Ramsden and James Ramsden, the younger," &c. The warrant then recited a surrender by the bankrupts "to Martin John West, Esq., one of the commissioners of the said Court, authorized to proceed with the said fiat," &c., and that several adjournments and examinations had taken place before Mr. West, the said commissioner, the bankrupt on each examination "being duly sworn."

"And whereas the said James Ramsden did, on the 30th day of March, 1846, pursuant to a summons issued by me at the request and on the application of the assignees," &c., "appear before me, the commissioner then acting in the prosecution of the said fiat, then and there to be examined touching divers matters," &c. "And I, William Burge, Esq., the said commissioner, in execution of the powers and authorities given by the several statutes," &c. "proceeded to examine the said James Ramsden," &c., "and the said James Ramsden, being then and there duly

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sworn, and required before me to make true answers to all such questions as should be put to him, I did cause the several questions next hereinafter enumerated," &c., to be propounded to him, &c.

The warrant then set out several questions and answers, and stated other adjournments and examinations at which the bankrupt was said to be "duly sworn;" and then proceeded thus, "which answers of the said James Ramsden not being satisfactory," &c., "these are therefore," &c. [commitment to York gaol.]

"Given," &c., "at the Court of Bankruptcy for the Leeds district," &c., this 6th of April, A. D. 1846.

"WILLIAM BURGE, (L. S.)
"Commissioner."

The other warrants of commitment were for non-payment of certain poor rates and highway rates. It is only necessary to notice one, as the same objection applied to all.

"To all constables," &c.

"Borough of Leeds," &c. "Whereas in and by a rate," &c., "dated," &c. (the warrant stated that a rate was made, assessed, allowed, and published, and that James Ramsden, being an occupier in the township of Armley, in the said borough, was duly rated in a certain sum; and that a demand of payment had been made and refused); "and whereas the said James Ramsden having been duly summoned to appear before two of her Majesty's justices of the peace for the said borough, to shew cause why the same should not be paid, did appear according to such summons, but hath not shewn any sufficient cause why the same should not be paid."

The warrant then recited that the justices had issued a distress warrant, but that no sufficient distress could be levied. "These are therefore to command you," &c. (commitment.)

"Given under our hands and seals the 27th of February, A. D. 1846.

"RALPH MARKLAND, (L. S.)
"JOHN ROBERT ATKINSON, (L. S.)"

Crompton and *J. Addison* appeared to support the commissioner's warrant.

F. Robinson appeared to support the justices' warrants.

The following objections amongst others were taken to the commissioner's warrant. First, that it appeared upon the face of it that the commissioner who had signed it was not the same to whom the fiat was, in pursuance of the general rules and orders in bankruptcy of the 12th of Nov. 1842, ss. 4 & 5, first allotted, nor was it shewn that he was acting in the absence of that commissioner. And, secondly, that it appeared upon the face of the order that the bankrupt was examined upon oath, a course of proceeding not warranted since the 8 & 9 Vict. c. 48.

Crompton and *J. Addison* shewed cause. The first objection is founded on certain rules which have been framed by the commissioners, under the authority of the 5 & 6 Vict. c. 122, s. 70 (*a*). By these rules (*b*) every fiat

(*a*) 5 & 6 Vict. c. 122, s. 70. "That it shall be lawful for the commissioners of the Court of Bankruptcy authorized to act in the prosecution of fiats in bankruptcy in *London*, or the major part of them, and such of the commissioners to be appointed under this act as shall be nominated by the Lord Chancellor for that purpose to make from time to time, subject to the sanction and confirmation of the Lord Chancellor, general rules and orders for regulating the forms of proceedings (where not provided for by this act) and the practice to be observed in every Court authorized to act in the prosecution of fiats in bankruptcy."

(*b*) General rules and orders in bankruptcy, 12th of November, 1842.—*Rule* 4. "Every commission or fiat in bankruptcy transferred to any district Court of Bankruptcy, under the provisions of the act, 5 & 6 Vict. c. 122, s. 52, shall, before, or forthwith after, any proceeding thereupon in such Court, be registered by a deputy registrar attending such Court, in a book to be kept for that purpose; and, in districts where there are two commissioners, shall be allotted by ballot in the presence of the solicitor acting under such commission or fiat, or in rotation, in such manner as the commissioners shall from time to time direct, to one of such commissioners, and shall be further prosecuted before such commissioner, or before the district com-

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directed to a district Court of Bankruptcy is to be allotted to one of the two commissioners who compose the district Court, "and shall be further prosecuted before such commissioner." These rules, however, are merely for the internal arrangement of business by the commissioners amongst themselves; and cannot interfere with the power and authority of the commissioners as conferred on them by statute. Besides the Court cannot take judicial cognizance that any such rules exist, and they are not brought before the Court upon affidavit. With respect to the other objection, it is true that the 8 & 9 Vict. c. 48, s. 1 (*a*),

missioner, where there is only one commissioner; provided always that either of the commissioners authorized to act in the prosecution of fiats in bankruptcy in any district in the country, may, in the absence of the other commissioner, sit or act for him.

Rule 5. "Every fiat issued after the commencement of the aforesaid act, and directed to any district Court of Bankruptcy, shall forthwith, after the delivery of the same at such Court, be registered by a deputy registrar attending such Court, in a book to be kept for that purpose, and a minute of the date of so registering the same shall be made at the time in writing at the foot of such fiat, and such fiat shall not be opened upon the application of any other creditor than the petitioning creditor until after the expiration of three days from such date; and such fiat shall be allotted by ballot or in rotation, and prosecuted as directed (by Rule 4) with respect to a commission or fiat transferred to such Court, subject to the like proviso in case of the absence of a commissioner."

(*a*) 8 & 9 Vict. c. 48, s. 1. "Whereas it is highly desirable that oaths shall not be administered unnecessarily by public authority, and there is reason to believe that the examination of a bankrupt or of the wife of a bankrupt before commissioners in bankruptcy will be equally effectual for obtaining a disclosure of the truth, and a full discovery of all that can be useful for the benefit of creditors, when such examination is conducted without oath. Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all persons who are now or shall be hereafter declared bankrupts under any fiat, or the wives of such persons respectively, shall and may be hereafter examined before such commissioners without being sworn, but after making and signing the declaration contained in the schedule hereunto annexed."

empowers the commissioners to receive the bankrupt's declaration otherwise than upon oath; but the bankrupt may himself have consented to be sworn, and therefore cannot raise this objection now. [*Wightman*, J.—The examination is not voluntary.] At any rate this objection cannot invalidate the warrant of commitment; as the 3rd section (*a*) expressly provides "that nothing herein shall in any wise affect the right of the commissioners of bankrupt to judge how far the answers to be made are satisfactory, *or to commit to prison* in case they shall hold such answers to be unsatisfactory."

Allen, Serjt., and *Gray*, in support of the rule. The Court will take cognizance of the general rules and orders made in the Court of Bankruptcy, in pursuance of the 5 & 6 Vict. c. 122, s. 70; and, if so, the commissioner making this warrant does not appear to have had any jurisdiction to do so. [Upon the other point they were stopped by the Court.]

WIGHTMAN, J.—With respect to the first objection, I think that I cannot take judicial cognizance of any rules and orders which the Court of Bankruptcy may have made; and as they are not brought before me on affidavit, the objection to the warrant, founded on their supposed operation, must necessarily fail. The other objection, however, seems to me to be fatal. By the previous statute, the 6 Geo. 4, c. 16, s. 36, the bankrupt is required to be sworn. But by the recent statute, the 8 & 9 Vict. c. 48, which is intituled "An Act to Substitute a Declaration for an Oath in cases of Bankruptcy," and the preamble to which recites that "it is

(*a*) Sec. 3. "Provided always, and be it enacted, that nothing herein shall in anywise affect the right of the Commissioners of Bankruptcy to judge how far the answers to be made are satisfactory, or to commit to prison in case they shall hold such answers to be unsatisfactory, nor the right of any commissioner or creditor to withhold his signature from the certificate of conformity."

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highly desirable that oaths shall not be administered unnecessarily by public authority," and that "there is reason to believe that the examination of a bankrupt" "will be equally effectual," "when such examination is conducted without oath;" it is enacted, "that all persons who are now or shall be hereafter declared bankrupts under any fiat," "shall and may be hereafter examined," "without being sworn, but after making and signing the declaration contained in the schedule hereunto annexed." I think that this enactment is imperative, and that the intention of the Legislature clearly was to prevent for the future the administering an oath to a bankrupt upon his examination; and that it therefore, in effect, repeals so much of the previous statute as required the examination of the bankrupt to be upon oath, and substitutes in lieu thereof a declaration in the form given in the act. The 3rd section, which has been relied upon, as sustaining the warrant, is only to avoid any difficulty which might arise where the bankrupt was examined upon oath before the passing of the statute, and committed to prison after it had passed. I think, therefore, that as to this warrant, the prisoner is entitled to be discharged.

The following objection was then stated to the justices' warrants. That it did not appear upon the face of the warrants that there had been any adjudication upon the complaint by the justices who had examined into it (*a*).

F. Robinson shewed cause. These warrants are subsequent proceedings to enforce obedience of a prior adjudication. It is not necessary, therefore, that they

(*a*) It was also objected upon affidavit, that the arrest was illegal, inasmuch as the prisoner had been arrested, under one of the warrants issued on the application of the officers of the parish of Armsley, on a Sunday; but as it appeared that he was afterwards detained by a warrant issued on the application of the parish of Wortley, without collusion; that objection was given up.

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should be made by the same magistrates who have adjudicated upon the complaint. The 3 Geo. 4, c. 23, s. 2, enacts, that after examination upon oath into the merits of the complaint, and the adjudication thereupon, by any two justices, &c., being made, "all and every the subsequent proceedings to enforce obedience thereto or otherwise, whether respecting the penalty, fine, imprisonment, costs, or other matter, &c., "may be enforced by either of the said justices," &c., "or any other justice of the peace," &c., "in such and the like manner as if done by the same two justices," &c., "who so heard and adjudged the said complaint." [*Wightman*, J.—But there is no statement here of any adjudication having been made.] There is no such statement in the form given in *Burn's Just.*, tit. *Poor Laws.*

Gray, contrà, was not called upon.

WIGHTMAN, J.—These warrants are defective on the face of them. There is nothing to shew that any adjudication was made by the justices before whom the complaint was heard; and all that the statute, 3 Geo. 4, c. 23, s. 2, does, is, when once an adjudication has been made by two justices, to authorize any other justice to issue a warrant to enforce it. This rule must, therefore, be made absolute.

Rule absolute.

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A warrant of commitment of a bankrupt for not giving satisfactory answers, stated that "a fiat in bankruptcy," "directed to her Majesty's Court of Bankruptcy for the Leeds district, was duly awarded and issued against Francis Ward;" "and whereas the said Francis Ward did, on," &c., "surrender himself to me, Martin John West, Esq., one of the commissioners of the said Court authorized to act in the prosecution of the fiat," &c. It then set out the examination and the questions and answers, and proceeded, "which answers of the said F. W. are not, nor are any of them, satisfactory to me the said commissioner," "these are therefore to require you," &c.

ALLEN, Serjt., moved for a rule, calling upon Martin John West, Esq., one of the commissioners of her Majesty's Court of Bankruptcy for the Leeds district; upon the official and trade assignees of Francis Ward, a bankrupt; upon the solicitor to the fiat; the sheriff of the county of York, and the gaoler of the castle of York; to shew cause why a writ of habeas corpus should not issue to bring up the body of the said Francis Ward; and why, in case the rule should be made absolute, he should not be discharged from custody without issuing such writ.

It appeared from the affidavit on which the motion was made, that Francis Ward was confined a prisoner in the castle of York, under a warrant of commitment by Martin John West, Esq., to the following effect:—

"In the Court of Bankruptcy for the Leeds district," &c.

"Whereas a fiat in bankruptcy, bearing date," &c., "directed to her Majesty's Court of Bankruptcy for the Leeds district was duly awarded and issued against Francis Ward, of," &c.; and "the said Francis Ward has been duly adjudged bankrupt thereunder; and whereas the said Francis Ward did on," &c. "surrender himself to me, Martin John West, Esq., one of the commissioners of the said Court, authorized to act in the prosecution of the said fiat, in order to make a full disclosure of his estate and effects." [After stating an adjournment to a subsequent day, and a surrender on that day, it proceeded.] "And I, the said commissioner,

Held, upon motion for a habeas corpus to discharge the bankrupt, that the jurisdiction of the commissioner to make the order sufficiently appeared; although there are two commissioners in the Leeds district, and it was not stated that the fiat had been allotted to the commissioner in question, or that he was acting in the absence of the other commissioner, in pursuance of the rules and orders made by the bankrupt commissioners under the 5 & 6 Vict. c. 122, s. 70.

Held also, that it was not necessary to specify which of the answers were unsatisfactory; although there were some, that taken separately and apart from the rest, could scarcely be deemed so

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in execution of the said fiat, and of the powers and authorities given to me by the several statutes made, and now in force, concerning bankrupts, this day proceeded to examine the said Francis Ward touching divers matters relating to his trade, dealings, and estates; and the said Francis Ward having then and there, in open Court, before me the said commissioner, duly made, signed, and subscribed, the declaration required by law to be made and signed by bankrupts in lieu of an oath, I did then and there cause the several questions, hereinafter enumerated and set forth, to be put to him the said F. W. before me the said commissioner; to which questions, so put as aforesaid, the said F. W. refused to give any other than the several answers immediately following the several questions respectively in manner and form following, that is to say:" [Here the questions and answers were set out at length.] "Which answers of the said Francis Ward are not, nor are any of them, satisfactory to me the said commissioner. These are therefore to will, require, and authorize you, immediately on the receipt hereof, to take into your custody the body of the said Francis Ward, and him safely convey to her Majesty's gaol of the castle of York, and him there to deliver to the governor or keeper of the said prison, who is hereby required, by virtue of the said fiat and statutes aforesaid, to receive the said Francis Ward, &c., and him safely to keep and detain, without bail or mainprize, until such time as he shall submit himself to me the said commissioner, or to any other commissioner duly authorized to act in the prosecution of the said fiat, and full answer make to my or his satisfaction, to the questions so put to him by me as aforesaid; and for so doing," &c. "Given," &c., "on," &c., "at the Court of Bankruptcy for the Leeds district," &c.

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Allen, Serjt., produced an affidavit, made by Ward the bankrupt, to the effect that the commissioner did not point out to him which of his answers were unsatisfactory; and

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that he was ignorant with which of the answers it was that the commissioner was dissatisfied. He submitted that the warrant of commitment was insufficient, on two grounds; First, that the general rules and orders in bankruptcy, 12th of Nov. 1842, ss. 4 & 5 (*a*), which were made under the authority of the 5 & 6 Vict. c. 122, sec. 70 (*b*), required that every fiat should be allotted by ballot to one of the two

(*a*) *Rule* 4. "That every commission or fiat in bankruptcy transferred to any district Court of Bankruptcy, under the provisions of the act, 5 & 6 Vict. c. 122, s. 52, shall before or forthwith after any proceeding thereupon in such Court, be registered by a deputy registrar attending such Court, in a book to be kept for that purpose; and, in districts where there are two commissioners, shall be allotted by ballot in the presence of the solicitor acting under such commission or fiat, or in rotation, in such manner as the commissioners shall from time to time direct, to one of such commissioners, and shall be further prosecuted before such commissioner, or before the district commissioner, where there is only one commissioner: provided always that either of the commissioners authorized to act in the prosecution of fiats in bankruptcy in any district in the country may, in the absence of the other commissioner, sit or act for him."

Rule 5. "That every fiat issued after the commencement of the aforesaid act, and directed to any district Court of Bankruptcy, shall forthwith, after the delivery of the same at such Court, be registered by a deputy registrar attending such Court, in a book to be kept for that purpose, and a minute of the date of so registering the same shall be made at the time in writing at the foot of such fiat, and such fiat shall not be opened upon the application of any other creditor than the petitioning creditor until after the expiration of three days after from date, and such fiat shall be allotted by ballot or in rotation, and prosecuted as directed (by Rule 4) with respect to a commission or fiat transferred to such Court, subject to the like proviso in case of the absence of a commissioner."

(*b*) Sect. 70. "That it shall be lawful for the commissioners of the Court of Bankruptcy authorized to act in the prosecution of fiats in bankruptcy in *London*, or the major part of them, and such of the commissioners to be appointed under this act as shall be nominated by the Lord Chancellor for that purpose, to make from time to time, subject to the sanction and confirmation of the Lord Chancellor, general rules and orders for regulating the forms of proceedings (where not provided for by this act), and the practice to be observed in every Court authorized to act in the prosecution of fiats in bankruptcy."

commissioners, where there were two, (as was the case in the Leeds district), and that such fiat should be prosecuted before him, unless in his absence, when it might be tried before the other. That this warrant did not shew that the commissioner making it was the commissioner to whom the fiat was so allotted, or that he was acting in the absence of the other commissioner. And, secondly, that as some of the answers upon the face of the warrant were not unsatisfactory per se, the ground of the commitment, namely, that the answers "are not, nor are any of them, satisfactory to me, the said commissioner," failed: and that the commissioner should have specified which answers were unsatisfactory, and called upon the bankrupt to answer them. In *Ex parte Lee* (*a*) it was decided that to justify a committal of a bankrupt for not answering satisfactorily, the commissioners should point out the unsatisfactory answers to the bankrupt, and press those points. And in *In re Hadland* (*b*), it was decided that a warrant of commitment of a bankrupt, which stated the ground of commitment thus: "several of which answers not being satisfactory, and particularly his answer to the last question, these are to require, &c., and full answers make to our or their satisfaction, to the questions so put to him by us as aforesaid," was bad.

Cur. adv. vult.

COLERIDGE, J.—This was a motion to discharge a prisoner, committed under a warrant of a commissioner of a district Court of Bankruptcy, for not giving satisfactory answers to the questions put to him by the commissioner in the course of his examination; and the application was rested on two grounds: First, that the warrant did not shew on the face of it any jurisdiction on the part of the commissioner to make it; and, secondly, that the cause of commitment was stated to be the giving answers, "which answers

(*a*) 2 Mont. & Ayr. 15.

(*b*) 1 Dowl. 835, N. S.

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of the said Francis Ward are not, nor are any of them, satisfactory to me, the said commissioner," &c.: whereas, upon the face of the warrant, were set out the answers, some of which the Court could see were not unsatisfactory: and that therefore the particular answers which the commissioner considered to be unsatisfactory should have been specified. I have considered both these objections, and am of opinion that neither of them can be sustained. With respect to the first, the 5 & 6 Vict. c. 122, s. 46, enacts, "that every fiat in bankruptcy issued after the commencement of this act, not directed to the Court of Bankruptcy, shall be directed to such one of the Courts authorized to act in the prosecution of fiats in bankruptcy in the country, as herein-after provided, as the Lord Chancellor," &c., "by such fiat may think fit to nominate, to be prosecuted in such Court, and that every such fiat shall be thereupon prosecuted in the Court to which the same shall be so directed, and it shall be lawful for such Court to proceed thereon in all respects as commissioners of bankrupt acting in the prosecution of a fiat in bankruptcy elsewhere than in the Court of Bankruptcy before the passing of this act, save and except as such proceeding may be altered by virtue of this act; and that in every bankruptcy prosecuted in any such Court every such Court shall have all the power, jurisdiction, and authority, and be subject to the duty, by any act of Parliament now in force, vested in or imposed upon such commissioners, in all respects as if such Court were commissioners of bankrupt returned and appointed under the said recited act, save and except as may be otherwise directed by this act." By the 59th section her Majesty is empowered to appoint certain persons to be commissioners of the Court of Bankruptcy, in addition to the then commissioners of the said Courts to act in the prosecution of fiats of bankruptcy in the country; and "any one or more of such additional commissioners shall and may form a district Court of Bankruptcy for the purpose of this act, and every such Court shall be authorized to act in the prosecu-

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tion of fiats in bankruptcy in the country, at such place and in and for such district as her Majesty, with the advice of her privy council, shall be pleased to direct." Now the warrant states, that "a fiat in bankruptcy directed to her Majesty's Court of Bankruptcy for the Leeds district was duly awarded and issued against Francis Ward," "and whereas the said Francis Ward did on," &c., "surrender himself to me, Martin John West, Esq., one of the commissioners of the said Court authorized to act in the prosecution of the said fiat," &c. This, it appears to me, is a sufficient statement that the commissioner so acting, was duly authorized to act under the act. It is urged, however, that as section 70 enables the commissioners to make "general rules and orders for regulating the forms of proceeding," "and the practice to be observed in every Court authorized to act in the prosecution of fiats in bankruptcy;" and as they have made certain orders by which every fiat directed to a district Court is to be allotted by ballot to one of the commissioners, and to be prosecuted before him, except in his absence, when it may be taken before the other commissioner; that therefore it should have been alleged that the fiat in the present case was allotted to this commissioner, or that he was proceeding in the absence of the other. It appears to me, however, that these rules do not interfere with the jurisdiction conferred by the act of Parliament; and that they are merely regulations for the arrangement of business among the commissioners themselves.

The other objection was, that it was not sufficient for the warrant merely to state generally, that the "answers of the said Francis Ward are not, *nor are any of them*, satisfactory to me, the said commissioner;" but that it should have specified which answers were unsatisfactory; and the case of *In re Hadland* (*a*) was relied on in support of this objection. That case, however, supposing it to be still an

(*a*) 1 Dowl. 835, N. S.

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authority after the decision to which I shall presently advert, is distinguishable from the present. There the statement in the warrant was, "several of which answers not being satisfactory, and particularly his answer to the last question;" and I there said, that that was not enough, for it was impossible to see which of the answers the commissioner thought were, and which were not, satisfactory. They might have been utterly irrelevant, and then nothing would have remained but the answer to the last question, which though perhaps sufficient, if it had stood alone, formed only part of the ground of commitment; and for that reason I then discharged the prisoner. That case, however, came under the consideration of the Court in *Ex parte Dauncey* (*a*). There the warrant stated generally "which said answers, so given," &c., "not being satisfactory to us," &c., "these are, therefore," &c. Now, that case strongly resembles the present; and if there be any distinction it is in favour of the latter. If I could see that the commissioner ought to have required further explanation, or that he had come to a wrong conclusion, it might be some ground for requiring that the matter should be reconsidered. But the Court should always be slow in interfering in cases like the present, where the manner and the occasion of giving the answer may go some way to render it satisfactory, or otherwise. And, in the present instance, upon looking at these answers, I think the commissioner had good reason to consider them unsatisfactory. It is said that some of the answers cannot, from the nature of them, be unsatisfactory, particularly the introductory answers; but I do not think the sufficiency of particular and isolated answers can invalidate the warrant. Taking them all together, the result seems to me to be that the bankrupt had not given satisfactory answers to the questions.

Rule refused.

(*a*) 4 Q. B. 668; S. C. 3 G. & D. 640.

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In re BULL.

On motion for a habeas corpus: *Held*, that it is not necessary that a bankrupt should make and sign the declaration required by the 8 & 9 Vict. c. 48, previous to each examination. It is sufficient if he do so previous to the first examination.

THIS was a rule calling upon William Burge, Esq., one of her Majesty's commissioners in bankruptcy, acting under a fiat issued against William Bull; the official and trade assignee under, and the solicitor to, the fiat; the sheriff of the county of York, and the keeper of the gaol of the castle of York; to shew cause why a writ of habeas corpus should not issue, to bring up the body of the said William Bull: or why the said William Bull should not be discharged out of custody, as to his commitment by virtue of a warrant of the said William Burge, Esq., without issuing the said writ.

It appeared upon the affidavit upon which the rule nisi was granted, that William Bull was a prisoner in the gaol of York Castle, under a warrant of commitment under the hand and seal of William Burge, Esq., one of the commissioners of the Court of Bankruptcy for the Leeds district.

The warrant recited a fiat against Bull, directed to the Court of Bankruptcy for the Leeds district, under which he had surrendered to William Burge, Esq.; that he had been examined, and upon his examination had made the answers set out in the warrant, after having subscribed the declaration required by the 8 & 9 Vict. c. 48. It then set out several adjournments and examinations, at each of the latter it stated that "the said William Bull having again made and signed the declaration required in the statute," and concluded, "which answers not being satisfactory to me, the said commissioner," &c., "these are therefore to require you," &c.: requiring him to be kept in prison "until such time as he shall submit himself to me, the said commissioner, or to any commissioner of the said Court, and full answers make to my, or his, satisfaction, to the questions so put to him as aforesaid." "Given," &c.

The affidavits, in answer, set out a second warrant, attached to the first, dated the 27th of April, 1846, the day

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on which this rule was obtained. This warrant stated a further examination of the bankrupt, on which occasion his former examination, "whereof copies are set forth in the within warrant," was read over to him; but did not state that he had, previous to such last examination, made or subscribed the declaration required by the 8 & 9 Vict. c. 48; and continued thus, (after setting out the answer made to a question, whether he had any explanation or addition to make to such his former examinations), "which answer being still unsatisfactory to me, I do hereby authorize you to continue to keep and detain the body of the said William Bull," &c. "Given," &c.

There were several objections made to the first warrant, which became immaterial, as the judgment of the Court proceeded upon the validity of the second. It was objected to the second warrant, that as it was not in existence when the rule was moved for, it could not be used in answer to it; and that even if it could, it was defective, inasmuch as it did not state that the bankrupt had before his last examination subscribed the declaration which is substituted by the statute 8 & 9 Vict. c. 48, s. 1, for the oath required by the 6 Geo. 4, c. 16, s. 36.

Crompton and *J. Addison* shewed cause. When the Court grant a rule like the present, which is a very modern practice, it is only to save the expense of having the party brought up upon habeas corpus. But the question of the legality of the custody is always to be discussed as if the writ of habeas corpus had been issued, and the motion were for the prisoner's discharge upon the return. The Court therefore will look at the second warrant. If so, it is submitted that the second warrant is valid, and is a sufficient cause of detainer, inasmuch as it refers to the former warrant and the examinations set forth in it, the answers to which are thereby declared to be not satisfactory to the commissioner. It is said, however, that this second warrant is insufficient, because it does not state that the bankrupt had

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made a fresh declaration upon his last examination; but it was not necessary to do so. The act of 8 & 9 Vict. c. 48, which substitutes the declaration in lieu of the oath required by the 6 Geo. 4, c. 16, s. 36, evidently contemplates only one declaration which shall relate to all the bankrupt's subsequent examinations. This may be gathered from the terms of the declaration itself as contained in the schedule. "I, A. B., the person declared a bankrupt under a fiat in bankruptcy," &c., "do solemnly promise and declare, that I will make true answer to all such questions as may be proposed to me respecting all the property of the said A. B., and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property, to the best of my knowledge," &c. The words of the 2nd section, that "if any such person so to be examined shall *in the course of the examination* wilfully make any false statement," &c., shew that the whole is but one examination, though it may be adjourned from day to day. The same point is continually occurring before arbitrators, and at Nisi Prius, where it has never been thought necessary, when the inquiry is adjourned from day to day, to reswear a witness at the next meeting, who has been previously examined. [They referred to *Ex parte Dauncey* (*a*) and *Ex parte Harrison* (*b*).]

Allen, Serjt., and *Lush*, in support of the rule. It is submitted that the second warrant cannot be used as an answer to this rule, since it was obtained after this rule was moved. But, supposing even that it could, it is insufficient, as it should have appeared that the bankrupt had made and signed the declaration required by the 8 & 9 Vict. c. 48. That statute merely substituted the declaration for the oath required by the former statute. It was always the practice to swear the bankrupt on each examination, and

(*a*) 4 Q. B. 668; S. C. 3 G. & D. 640.
(*b*) 1 B. & Ad. 410.

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the law in altering the form, has not altered the necessity of the declaration being taken.

Cur. adv. vult.

WIGHTMAN, J.—I think that I must treat this case as if upon a return to a writ of habeas corpus; and as I am of opinion that the second warrant is good, it becomes unnecessary to consider the sufficiency of the first. The second warrant refers to the first warrant and the examinations, "whereof copies are set forth in the within warrant." It is said that it is invalid, because it does not state on the face of it that the bankrupt has made and signed a declaration pursuant to the statute 8 & 9 Vict. c. 48; but I think it is not necessary that it should do so, as by reference to the first warrant it appears that the bankrupt had already made and signed such a declaration; and I am of opinion that it was not necessary that he should do so on each successive examination. I am fortified in this view by the terms of the statute, which after enacting, by sect. 1, that a bankrupt "shall and may be hereafter examined before such commissioners without being sworn, but after making and signing the declaration contained in the schedule hereunto annexed," provides, by sect. 2, "that if any person so to be examined shall, *in the course of the examination*, wilfully make any false statement," he shall be guilty of a misdemeanor. I think the statute plainly contemplates an examination which may last more than one meeting. It is very similar to what takes place at arbitrations, where, although the witness is only sworn once, the case may, and often does, last several days; and were a witness, under such circumstances, to make a false statement, there is no doubt that he could be indicted for perjury. The rule must, therefore, be discharged.

Rule discharged.

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BEDWELL *v.* COULSTRING.

THIS was a rule calling upon the plaintiff to shew cause why he should not be dispaupered, and why he should not pay the costs of the day for not proceeding to trial. It appeared from the affidavit on which the rule was obtained, that the plaintiff, who sued in formâ pauperis, had twice given separate notices of trial, and had countermanded the first, and withdrawn the record on the second occasion, and had given a fresh notice for the sittings in this Term, which had not expired at the time the rule was obtained.

The plaintiff, in person, shewed cause upon an affidavit, from which it appeared he had again made default by withdrawing the record at the sittings in this Term.

A plaintiff suing in formâ pauperis, and conducting himself vexatiously, may be called upon by the same rule to shew cause why he should not pay the costs of the day for not proceeding to trial, as well as be dispaupered.

T. W. Saunders, in support of the rule.

WIGHTMAN, J. There is no doubt that the plaintiff has conducted himself very vexatiously. The only doubt in my mind is, whether he can be called upon by the same rule to pay the costs of the day, as well as to shew cause why he should not be dispaupered. The Master, however, informs me that he sees no objection to a rule in this shape; and as I think the application is reasonable, under the circumstances, the rule will therefore be absolute.

Rule absolute.

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DOE dem. HAXBY *v.* PRESTON.

On a motion to set aside an award, the Court will not look at the notes of the arbitrator.

THIS was a motion to set aside an award, which had been made by a barrister, to whom the cause and all matters in difference had been referred, by an order of nisi prius, at the York Summer Assizes of 1840.

Addison shewed cause, and was proceeding to read a verified copy of the arbitrator's notes (*a*), when

Martin (with whom was *Rew*) objected to his so doing, on the ground that it would be introducing a very inconvenient and novel practice, if such a course were permitted; and infringing in substance, if not in terms, a rule laid down by the Bar, that an arbitrator could not be called upon to make an affidavit of what had taken place before him. Besides here the copy of the notes could not in any way be evidence. He observed, that it was not any wish to exclude the particular notes in this case, that suggested the objection; but the desire to prevent a rule being broken through, and introducing a practice which might be found very inconvenient to the Profession.

Addison said, that the arbitrator was willing to furnish the Court with the original notes themselves.

COLERIDGE, J., however said, that the rule laid down by the gentlemen of the Bar was a very proper one, and that it would certainly be infringing on it, if such notes were to be received.

The point was not further pressed.

(*a*) They were verified by his clerk.

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DOE dem. TEW *v.* BILLINGHAM.

A demand of costs, pursuant to a Master's allocatur, indorsed on a consent rule, was held sufficient for an attachment; where the affidavit stated that the deponent had served the defendant with a copy of the original rule and allocatur, at the same time shewing him the original rule and allocatur, and had "then demanded of him the costs allowed by the Master upon the said rule;" although it did not appear that any sum was named.

THIS was an action of ejectment in which, on the cause coming on for trial at the Spring Assizes, 1841, for Northampton, the lessor of the plaintiff was nonsuited for want of the defendant appearing at the trial and confessing lease, entry, and ouster, pursuant to the consent rule. The costs were afterwards taxed on the consent rule, and the Master's allocatur indorsed thereon for 44*l.* 10*s.*

Wood now moved for an attachment against the defendant for nonpayment of those costs.

The affidavit stated that the deponent had served the defendant on the 29th of April last "with a true copy of the rule and the Master's allocatur thereon, and at the same time shewed him the said original rule and allocatur, and that this deponent then demanded of him the costs allowed by the Master upon the said rule;" but that the defendant has not paid the same, or any part thereof, &c.

He submitted, that the affidavit discovered a sufficient demand to entitle him to this rule. It is true that it does not shew that the amount demanded was named to the defendant; but it is stated that the deponent demanded the costs allowed by the Master upon the said rule, and at the same time shewed the defendant the said rule. This, it is submitted, is equivalent to an allegation that he demanded the exact sum.

WIGHTMAN, J. I think that you are entitled to an attachment.

Rule absolute.

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EADES *v.* BOOTH.

(*In the full Court.*)

Where an infant plaintiff was of too tender years to be able to write, the Court granted her petition to sue by her father as her prochein ami, on its being signed by him for her, in her name.

THIS was an action for an injury done to the person of the plaintiff, who was an infant of the age of twenty months, by the horse and cart of the defendant running against her.

Spinks stated that a difficulty had occurred as to the signature by the infant of the petition to be permitted to sue by her prochein ami; the infant, from her tender age, not being able to write or to make her mark. It had however been signed by her father for her in the following form:—"Eliza Ann Eades. Signed by me for her, being her father and next friend, George Eades." He submitted that this was sufficient, and that the Court would make the necessary order. He produced an affidavit of these facts, &c., verifying the father's handwriting.

PER CURIAM.

Fiat (*a*).

(*a*) See *Morgan v. Thorne*, 7 M. & W. 400; S. C. 9 Dowl. 226.

SAUNDERS and Another, Assignees *v.* JONES.

Where proceedings are taken against good faith, the party must come promptly to set them aside, as in the case of an irregularity. Therefore where a judgment was signed against good faith, of which the defendant had notice on the 6th of April, an application to set it aside on the 20th of the same month was held too late.

Where the plaintiffs had given a fourteen days' notice of a writ of inquiry in an action in which the venue was laid in Middlesex, and afterwards gave a notice of continuance, which was not sufficient if the defendant resided more than forty miles from London: *Held*, on motion to set aside the execution of the writ of inquiry, on the ground of the insufficiency of the notice of continuance, that the defendant's affidavit was sufficient which described him as "of Ragland," in the county of Monmouth, and which stated that he had received no other notice of continuance than the one so given, and that Ragland was one hundred and thirty-six miles from London; although it did not state in positive terms that he resided at Ragland.

JUDGMENT, as for want of a plea, had been signed in this action, in breach, as it was alleged, of good faith. It appeared that after declaration delivered, the defendant's

attorney had had an interview with one of the plaintiffs, who had promised to see his attorney on the subject of the action, and to let the defendant's attorney know the result, and that in the mean time no further steps in the action should be taken. Nothing was heard from him; but on the 2nd of April the plaintiffs' attorney signed judgment as for want of a plea. On the 6th of April, a notice of a writ of inquiry, to be executed on the 23rd of April, was served on the defendant's attorney, and on the 20th a notice of continuance till the 30th. On the 20th an application was made, on the part of the defendant, to a Judge at Chambers, to set aside the judgment; but was refused by the Judge on the ground of the lapse of time.

Gray now moved for a rule to set aside the judgment. He contended, that as the case of *Smith* v. *Clarke* (*a*) shewed that a motion to set aside proceedings on the ground of their being against good faith was not a motion on the ground of irregularity, that therefore the rule of Hil. Term, 2 Wm. 4, r. 23, did not apply; or at any rate, if it did, that the delay was not so unreasonable that the Court would refuse to interfere.

WIGHTMAN, J.—I am clearly of opinion that you are too late. The defendant had notice of the judgment being signed on the 6th of April, and he gives no reason for delaying his application till the 20th of April.

Rule refused.

A rule nisi being afterwards obtained to set aside the execution of the writ of inquiry on the ground of irregularity in the notice of continuance.

Keating shewed cause. As the venue in this action is

(*a*) 2 Dowl. 218.

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laid in Middlesex, the notice of continuance is, perhaps, too short, if the defendant live more than forty miles from London; but there is nothing in the affidavit on which this rule is obtained to shew that such is the case. The defendant, it is true, describes himself in his affidavit as "Merrick Jones of the parish of Ragland in the county of Monmouth, Maltster," and he swears, that he received the notice of the writ of inquiry on or about the 6th of April, and that he has not received any notice of continuance, other than the notice of the 20th of April, and "that Ragland is distant from Middlesex one hundred and thirty-six miles and upwards;" but there is nothing to shew that he resides at Ragland. As this is a motion to set aside proceedings for irregularity, he should have sworn positively that at the time of receiving the notice of continuance he was residing at Ragland.

Gray. The natural and ordinary construction to be put upon this affidavit is, that the defendant resides at Ragland. At any rate, the Court will look at the first notice given, and as that is a fourteen days' notice, will conclude that in this case the defendant resides more than forty miles from London. If the fact were otherwise, the plaintiffs might have shewn it.

WIGHTMAN, J.—I think it must be taken that the defendant resides more than forty miles from London. The ordinary inference on reading the affidavit would be, that such was the case, and that, coupled with the fact that the plaintiffs have treated him as so residing, by giving a fourteen days' notice in the first instance, is, I think, sufficient.

Rule absolute.

1846.

RICCARD *v.* KINGDON.

Where a verdict is taken at nisi prius for a nominal sum, the *cause* only being referred to the award of an arbitrator, the motion to set aside the award should be made within the four days limited for a motion for a new trial.

GREENWOOD moved, on the last day but one of this Term, to set aside an award, on the ground, inter alia, that the finding did not determine all the issues in the cause.

It appeared that this cause came on for trial at the last Spring Assizes for the county of Devon, when a verdict was taken for the plaintiff by consent for the damages laid in the declaration; *the cause* being referred to the award of certain arbitrators who were to direct whether the verdict so found should stand, and if so, for what amount of damages; or whether the verdict should be entered for the defendant. The costs of the cause and of the reference were to be in the discretion of the arbitrators. The arbitrators made their award on the 13th of April, by which they directed that the verdict for the plaintiff should stand, but that the damages should be reduced; that the plaintiff should be allowed to take out of Court a sum of money, which the defendant had paid in; and that the defendant should pay the costs of the reference and of the award.

Greenwood submitted that the motion was in time. If the motion were to set aside the verdict entered up in pursuance of the award, it might possibly be necessary to make it within the first four days of the Term after the making of the award; but here the motion being to set aside the award, it will follow the general course of motions to set aside awards, which may be made at any time before the last day of the Term next following the making of the award. There is, indeed, no fixed rule on the subject; and the question is now under discussion (*a*) in the full

(*a*) PAXTON *v.* The GREAT NORTH of ENGLAND RAILWAY COMPANY.

(Before Lord *Denman*, C. J., and *Patteson*, J.)

THIS was an action of debt, in which a verdict was taken at nisi prius for the debt claimed, and one farthing damages, subject to the award of a barrister, to whom all matters in difference in the cause

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Court. He cited *Anderson* v. *Fuller* (*a*), and *Allenby* v. *Proudlock* (*b*).

were referred, with power to order a verdict for the plaintiff, or a nonsuit or verdict for the defendant. There was also a power to state points of law for the opinion of the Court. The arbitrator made his award on the 15th of November, 1844, and stated certain points of law, subject to the opinion of the Court upon which, the verdict for the plaintiff was to stand. The parties had notice of the award on the 16th of November, and in the Hilary Term following, a rule was obtained by the defendants to enter up the verdict in their favour on the point raised.

In Easter Term, 1846,

Martin, *Granger*, and *Rew* shewed cause, and objected that the motion was not in time. The parties having notice on the 16th of November that the award was made, were bound to come to the Court within the same time as in the case of a new trial, namely, within four days; and they were too late in deferring their application till the next Term. They cited *Allenby* v. *Proudlock*, (4 Dowl. 54); *Moore* v. *Butlin*, (7 A. & E. 595; S. C. 2 N. & P. 436); *Hayward* v. *Phillips*, (6 A. & E. 119; S. C. 1 N. & P. 288).

The Solicitor General and *Addison*, contrà, sought to distinguish the above cases, and insisted that the Court had a right, even in motions for new trials, to permit them to be made after the four days, if it so thought fit. They argued also that the finding was conditional, and that it was necessary for the plaintiff to come to the Court to give effect to it.

Lord DENMAN, C. J., said, that it was necessary that some limitation of time should be put to such motions, and that the rule which had been adopted by the Courts, and which required the motion to be made within the four days limited for motions for a new trial, had been adopted from a sense of its expediency, and recognized in many cases.

PATTESON, J., referred to the books of practice, as laying down the distinction between motions of this kind where there was a reference of the cause and all matters in difference, and a reference of the cause only. He said that he thought that it was advisable to adhere to the rule which limited the time within which the motion in the latter case must be made to that which obtained in the case of a new trial; but did not mean to say that the parties might not shew some special reason for the delay. Here, however, there was no such reason alleged.

Rule discharged.

(*a*) 4 M. & W. 470; S. C. 7 Dowl. 51. (*b*) 4 Dowl. 54.

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WIGHTMAN, J., referred to *Chit. Arch. Prac.*, p. 1252 (*a*), as laying down the rule "that where a verdict is taken at nisi prius, and the *cause only* is referred, and the arbitrator is put merely into the place of a jury, the motion should, in ordinary cases, be made within the time limited for a motion in arrest of judgment, or for a new trial, viz., within the first four days of Term, which occur next after the publication of the award." For this the case of *Rawsthorn* v. *Arnold* (*b*) and various authorities are cited.] The Court will, at any rate, allow the party to file affidavits to account for the delay. [*Wightman*, J.—No, I think I ought not to do that, as you have chosen to wait till the last day of Term on which a motion for an award can be made.]

Cur. adv. vult.

On the following day,

WIGHTMAN, J., said, that the rule of practice was well established, and ought not to be disturbed, that where a cause only was referred, the motion to set aside the award, except under special circumstances, must be made within the four days limited for motions for new trials. The rule must, therefore, be refused.

Rule refused.

(*a*) 7th ed.
(*b*) 6 B. & C. 629; S. C. 9 D. & R. 556.

TITTERTON *v.* SHEPPARD.

It is no objection to a rule calling on an attorney to pay a sum of money pursuant to his undertaking, that nearly three years have elapsed since it was given; repeated applications for payment having been made from time to time up to a recent period.

THIS was a rule calling upon Robert Swan, an attorney of this Court, to shew cause why he should not pay to A. F. Chamberlayne, as surviving partner of the late George Meaden, deceased, the sum of 7*l.*, being the

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amount of the taxed costs ordered to be paid by an order of the late Chief Baron, dated the 10th of April, 1843, made in the matter of a feigned issue, *Titterton* v. *Sheppard*, then pending in this honorable Court, pursuant to his undertaking, dated 3rd of May, 1843; and why the said Robert Swan should not pay the costs of this application.

The affidavits, on which the rule nisi was obtained, shewed that Chamberlayne and Meaden were in partnership as attorneys, and had been the attorneys of the plaintiff in a feigned issue in *Titterton* v. *Sheppard*, in which Swan acted as attorney for the defendant. That a Judge's order having been obtained to set aside a summons with costs, to be taxed and paid to the plaintiff, which costs were taxed at 7*l.*, Swan gave an undertaking to pay the amount in the following terms:—

"Titterton *v.* Sheppard.

"In consideration of your not making the annexed order a rule of Court, I undertake to pay the amount of the taxed costs on the 20th of July next, as allowed on the said order.

"ROBERT SWAN,
3rd of May, 1843."

"To Messrs. Chamberlayne
and Meaden."

That the order had accordingly not been made a rule of Court. And that repeated applications had been made to Swan to pay the amount, the last of which was on the 12th of December, 1845; but that he had not done so.

The affidavit of Swan in answer shewed that the feigned issue was tried on the 30th of November, 1843; that Messrs. Chamberlayne and Meaden had subsequently made an affidavit of increased costs, but had not since proceeded further with the action, upon which the defendant supposed that his said undertaking was waived, or that Messrs. Chamberlayne and Meaden had entered

into some arrangement for the payment of general costs in this action, including those costs; that in consequence of the delay in pressing for payment, he would lose the whole of the money, as he verily believes that the pecuniary circumstances of Sheppard are such that he is unable to repay him.

Pigott shewed cause. This application is made too late. It is an appeal to the summary jurisdiction of the Court, and should therefore have been made promptly. In the case of *In re Hilliard* (*a*), Mr. Justice *Coleridge* thus states the grounds upon which the Court interferes in such cases. "It seems to me that the Court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. The Court acts on the same principle, whether the undertaking be to appear to accept declaration, or other proceedings in the course of the cause, or to pay the debt and costs. It does not interfere so much as between party and party to settle disputed rights; as criminally to punish by attachment, misconduct, or disobedience in its officers." If the Court make this rule absolute, an attachment may be granted on its non-performance. It is therefore in the nature of a criminal proceeding; and the case of *Garry* v. *Wilks* (*b*), shews that where an attorney is charged with oppression towards his client, the application to the Court must be made promptly. There the party suffered only three Terms to elapse; and yet the Court, as there was no attempt made to explain the delay, refused to interfere. So in *Anon.* (*c*),

(*a*) *Ante*, vol. 2, p. 919.
(*b*) 2 Dowl. 649.
(*c*) 2 B. & Ad. 766.

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the lapse of three and a half years was held too great, where misconduct was alleged. In the present case, nearly three years have elapsed. The recent case of *In re Fairthorne* (*a*) perhaps will be relied on by the other side, as there a rule similar to the present was granted after a longer interval of time; but in that case the objection was not taken. Besides, here the affidavit shews, that owing to the delay, Swan will be unable to recover the amount from his client; between whom and Swan the relationship of attorney and client ceased on the conclusion of the action. At any rate the Court will not make the rule absolute with costs.

Joyce, contrà, was not called upon.

WIGHTMAN, J.—The present case is distinguishable from those which have been cited. In those cases the attorney was charged with misconduct. Here it is only sought to enforce an undertaking to pay a sum of money expressly entered into by him, and which he has neglected to perform. It is sworn that payment has been demanded from time to time up to a recent period without success. I think, therefore, that I must make this rule absolute. With respect to the costs, this case must follow the general rule, which is, that where a party ought to pay a sum of money, but does not do so, and the intervention of the Court is necessary to compel him, the party coming to the Court for assistance is entitled to the costs of his application.

Rule absolute.

(*a*) *Ante*, p. 548.

COURT OF COMMON PLEAS.

Easter Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

CAPES *v.* JONES. - *6 C. - 2 CB - 911.* 1846.

Where a cause of action to which the provisions of the 23 Geo. 2, c. 30, s. 5, (The Tower Hamlets Court of Requests' Act) extend, is made the subject of an action in the superior Courts, and tried on a writ of trial before the secondary, and a verdict is found for less than 40*s*., it is competent for the defendant to avail himself of the objection by suggestion under sect. 7, although the secondary has not power to certify under sect. 8.

TALFOURD, Serjt., shewed cause against a rule nisi obtained by *Dowling*, Serjt., for entering a suggestion under the 23 Geo. 2, c. 30, (the Tower Hamlets Court of Requests' Act) (*a*), to deprive the plaintiff of his costs, and

(*a*) Sect. 5. Provides, that "it shall and may be lawful to and for any person or persons who now have, or hereafter shall have, any debt or debts owing unto him, her, or them, not amounting to the sum of forty shillings, by any person or persons whatsoever, residing or inhabiting, or keeping any shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the district hereinbefore described, or any part thereof, to cause such debtor or debtors, so resiant, inhabiting or keeping any shop, shed, stall or stand, or seeking a livelihood, or trading or dealing, as aforesaid, to be warned or summoned by one of the said beadles, who is hereby appointed, authorized, and required to execute all warrants, precepts, and process of the said Court of Requests, by personal service, or by writing left at the dwelling-house or place of abode, shop, shed, stall, stand, or any other place of dealing of such debtor or debtors, to appear before the commissioners of the said Court, to be held at or in the said Court house, or other place to be provided as aforesaid; and that the said commissioners, or any three or more of them, shall, after such summons as aforesaid, have full power and authority, by virtue of this act, from time to time, to

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to give the defendant his costs of defence. It was an action of debt, and the declaration contained a count for goods sold and delivered, and also for money due on an account

make or cause to be made, such acts, order or orders, decrees, judgments and proceedings between such party or parties, plaintiffs, and his, her, or their debtor or debtors, defendants, touching such debts, not amounting to the sum of forty shillings, as they shall find to stand with equity and good conscience; and all such acts, order or orders, decrees, judgments and proceedings, shall be entered and registered in a book or books, to be kept for that purpose by the clerks of the said Court, or one of them, and shall be observed, performed, and kept in all parts, as well by the plaintiff, as the debtor or defendant."

Sect. 7. "That if any action of debt, or action on the case upon an assumpsit, for recovery of any debt to be sued or prosecuted against any person or persons aforesaid, in any of the King's Courts at Westminster or elsewhere, out of the said Court of Requests, and it shall appear to the Judge or Judges of the Court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to the sum of forty shillings, and the defendant in such action shall duly prove, by sufficient testimony, to be allowed by any the Judge or Judges of the Court where such action shall depend, that at the time of commencing such action, such defendant was inhabiting and resiant within the district hereinbefore described, or any part thereof, and was liable to be warned or summoned before the said Court of Requests for such debt; then, and in such case, the said Judge or Judges shall not allow to the said plaintiff any costs of suit; but shall award that the said plaintiff shall pay so much ordinary costs to the party defendant, as such defendant shall justly prove before the said Judge or Judges it hath truly cost him in defence of the said suit."

Sect. 8. "Provided always,"—"that where the plaintiff shall, upon any action brought in any of the King's Courts at Westminster, or in any of the Courts of great session of Wales, or counties palatine, obtain a verdict for less than forty shillings, if the Judge or Judges, who shall try the said cause, shall certify, that there was a probable or reasonable cause of action for forty shillings or more, in every such case the plaintiff shall not be liable to pay costs, but shall recover his costs of suit, as if this act had not been made."

Sect. 21. "That no action or suit for any debt not amounting to the sum of forty shillings, and recoverable by virtue of this act in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof in any other Court whatsoever."

stated. The defendant pleaded to the first count, payment, and to the second, never indebted. Issue was joined on these pleas, and a writ of trial directed to the secondary of the city of London, was obtained. At the trial, the plaintiff obtained a verdict for 1*l.* 7*s.* 6*d.* The cause of action having arisen within the district to which the 23 Geo. 2, c. 30, extended, and being one of those mentioned in sect. 5, an application was made to the secondary under sect. 8, to certify that there was "a probable or reasonable cause," for bringing the action for a greater sum than 40*s.*; as it appeared in evidence, that the plaintiff could not recover a certain portion of his demand, amounting to about 5*l.*, in consequence of no counts suitable to the subject of those claims being in the declaration. The secondary declined to certify, as no authority was produced, shewing that he had power so to do. On the part of the defendant, however, no objection was raised at the trial, that a less sum than 40*s.* was recovered by the plaintiff.

Talfourd, Serjt., now contended that the defendant had mistaken his remedy, as he should either have pleaded the statute or taken the objection at the trial. In the statute, there were two provisions applicable to such cases as the present. By sect. 21, certain actions were forbidden to be brought in the superior Courts, and in such cases *Parker* v. *Elding* (*a*) was an authority to shew that the proper mode of proceeding was by objection at the trial. The case of *Taylor* v. *Blair* (*b*) also shewed, that under such a provision an application to enter a suggestion was not the proper course. That case arose under the Westminster Court of Requests' Act, and in the clause providing for the manner in which advantage is to be taken of the statute it was enacted, "that the defendant may plead," &c. The Court there was of opinion, that the defendant might either plead the statute, or take advantage of it under the general issue; but that, not

(*a*) 1 East, 352.

(*b*) 3 T. R. 452.

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having done so, he could not avail himself of it by suggestion. Then with respect to sect. 7, it would be contended, that under that section the defendant had an option to move to enter a suggestion, and the case of *Barney* v. *Tubb* (*a*) might be cited. That case was decided on the Southwark Court of Requests' Act, 22 Geo. 3, c. 27; but there, although the provisions of the section on which the opinion of the Court proceeded were similar to those of sect. 7 in the present act, yet there was no section corresponding to sect. 21. That case, therefore, could not be regarded as an authority on the present statute. If not, then the two sections might be reconciled. The language of sect. 8 was in furtherance of this view, and evidently required to be read in conjunction withsect. 7. If it were so read, then the power of the Court to enter a suggestion would only exist in those cases where the tribunal which tried the issue had power to certify as to the plaintiff having "a probable or reasonable cause" for bringing his action to recover a greater sum than 40*s*. Here, the secondary had no such power, and, therefore, the Court could not direct a suggestion to be entered. In *Jones* v. *Barnes* (*b*) and *Elsley* v. *Kirby* (*c*) it was decided that the undersheriff had no such power. It would therefore be unjust to deprive the plaintiff of the advantage to which he would be entitled under sect. 8, by directing the cause to be tried before a tribunal which had not power to grant the certificate.

Dowling, Serjt., in support of the rule. Effect must be given, if possible, to all the sections of the act. This would not be done if the defendant were deprived of his option, either to proceed under sect. 7 or sect. 21. Although by the provisions of the 3 & 4 Wm. 4, c. 42, and the decisions in cases similar to the present, the undersheriff or secondary had not power to grant the certificate contemplated by

(*a*) 2 H. Bl. 350.

(*b*) 2 M. & W. 313; S. C. *nom. div.* 5 Dowl. 455.

(*c*) 1 Dowl. 946, N. S.; S. C. 9 M. & W. 536.

sect. 8, that could not deprive the defendant of his option to proceed under sect. 7. The plaintiff had selected his own tribunal in trying his cause before the secondary, and he could not by that selection, which deprived him of one advantage, deprive the defendant of another, which arose from an independent provision in the statute. [*Cresswell*, J. —There is this difficulty in the case. The sheriff has no power to certify, but if the cause had been tried before a Judge of the superior Courts, he might have certified that the plaintiff had "a probable or reasonable cause" for bringing his action to recover a larger sum than 40*s.*; and it would be hard upon the plaintiff, that by acceding to an order to try before the secondary, he should deprive himself of the advantage to which he would be entitled under sect. 8.] Under sect. 7 no certificate was necessary, but it was expressly required under sect. 8; if, therefore, the plaintiff sought to avail himself of that section, he ought not to have proceeded before a tribunal which had not power to grant the certificate. [*Tindal*, C. J.—In *Shaw* v. *Oates* (*a*) it was decided, that the want of power on the part of the undersheriff to grant such a certificate, did not interfere with the defendant's right to enter a suggestion.] *Bishop* v. *Marsh* (*b*), and *Forbes* v. *Simmons* (*c*), were authorities to the same effect. Besides, this mode of proceeding was more beneficial to the plaintiff than if the defendant pleaded the statute, for in such a case, upon a discontinuance, or a verdict, or a nonsuit, the plaintiff would be compelled to pay the whole of the costs, and must afterwards proceed in the inferior Court, in order to recover the amount of his claim; where the defendant, however, applied to enter a suggestion, the plaintiff was at least able to retain the amount which he had recovered in the superior tribunal. On the other hand, the defendant, by pursuing this course, incurred the risk of a certificate if the cause was not tried on a writ of trial, which he did not

(*a*) 4 Dowl. 720.
(*b*) 6 Bing. N. C. 12; S. C. 8 Scott, 128; 8 Dowl. 1.
(*c*) 9 Dowl. 37; S. C. 2 Scott, N. R. 198.

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incur if he pleaded the statute under sect. 21. On these grounds, the defendant was entitled to have the present rule made absolute.

TINDAL, C. J.—In this case, the different sections of the Court of Requests' Act ought to be reconciled, if practicable. One (sect. 21) provides, that no action for any debt not amounting to the sum of 40s. recoverable by the act in the Court of Requests, shall be brought in any other Court; and there is no doubt, that under that section the defendant could only take advantage of the act by a plea or at the trial. The other section (s. 7) gives a power to the Court to award costs to the defendant, if it shall appear to the Judges that the debt does not amount to 40s., and that the defendant resides within the jurisdiction of the Court of Requests. The doubt has been, whether the 7th and 8th sections are to be so read together, that unless the Judge is a Judge who has power to certify under the 8th section, the 7th section becomes impracticable. But it appears to me, that the cases which have been cited, particularly *Forbes* v. *Simmons* (*a*), have determined this; and that, although the sheriff may be an officer presiding at the trial, without the power to certify that there was a reasonable cause of action under sect. 8, still the Court will allow a suggestion to be entered for the costs; and, perhaps, doing so is not unreasonable, as it was the plaintiff's own fault to carry a cause to trial before a Judge who could not control the verdict by his certificate.

COLTMAN, J.—By not pleading the special matter under the act, the defendant may subject himself to the inconvenience of having, when he comes to trial, a certificate by the Judge that there was a "reasonable cause" of action for more than 40s.: still that is no reason why he should not have the benefit which may be open to him under the 7th section. It appears, that by the operation of the act

(*a*) 9 Dowl. 37; S. C. 2 Scott, N. R. 198.

giving the writ of trial, the plaintiff has lost the advantage of having the cause tried before a Judge who can give such certificate; but though that may be a ground for not having the cause tried before the sheriff, it is no reason for depriving the defendant of his right to enter a suggestion on the record under the 7th section.

CRESSWELL, J.—I am of the same opinion. This statute gives two modes of proceeding; that is to say, it may be either by way of plea, or by entering a suggestion on the record; and it is open to the defendant to avail himself of which mode he pleases. I certainly, in the first instance, thought, that if the verdict was at a trial before a tribunal not competent to certify under the 8th section, the defendant was not at liberty to make his application under the 7th section. But I think that the answer to that is, that it was the plaintiff's own fault to go to trial before a Judge who was incompetent to certify. He need not have applied for a writ of trial; and if, on the other hand, the defendant had applied to have the cause so tried, the plaintiff might have opposed it on the ground of the sheriff being unable to certify.

ERLE, J.—I concur in thinking that we should, if possible, give effect to both clauses of this act; and I cannot say that the prohibitory clause has any effect by way of prohibition of any proceedings under the 7th section, but that the remedy by suggestion remains open to the defendant.

Rule absolute.

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1 C. 2 Ch. 921

HODGES *v.* TOPLIS and Another.

The Court compelled a pauper to pay the costs of the day for not proceeding to trial pursuant to notice, the cause of his default being a mistake of his attorney's clerk in preparing the jury process.

DOWLING, Serjt., shewed cause against a rule nisi obtained by *Channell*, Serjt., requiring the plaintiff, who sued in formâ pauperis, to shew cause why he should not pay the costs of the day for not proceeding to trial, pursuant to notice. The application was founded on 1 Reg. Gen., Hil. Term, 2 Wm. 4, r. 110. The words of the rule were, "where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a rule to shew cause why he should not pay costs, although he has not been dispaupered." In answer to the application it was sworn that the plaintiff had been admitted to sue in formâ pauperis, and the cause being at issue on the 24th of January, notice of trial was given for the Middlesex sittings after Hilary Term. On the last day for entering the cause for trial with the marshal, the plaintiff's attorney's clerk who had the management of the cause, was occupied till a late hour, and, by mistake, he filled up a writ of distringas juratores instead of a writ of habeas corpora juratorum. When taken to the sheriff's office, the process was refused, and before the mistake could be rectified, it was too late to enter the cause with the marshal. These facts, it was submitted, prevented the case from coming within that class to which the rule in question was applicable. They were cases in which the conduct of the pauper himself had been clearly vexatious; as in *Doe* d. *Lindsey* v. *Edwards* (*a*), where the pauper had withdrawn the record on account of his not being prepared with documents necessary for the purposes of the cause. So in *Gore* v. *Morphew* (*b*), where the pauper had vexatiously given two notices of trial, and not proceeded in pursuance of either. But here, the reason of the plaintiff not trying his cause was the accidental slip of the attorney's clerk.

(*a*) 2 Dowl. 471. (*b*) 8 Dowl. 137.

The effect of granting the present rule would be, that although the plaintiff had sworn he was not worth five pounds, he would be required to pay a sum far beyond that amount.

Channell, Serjt., in support of the rule. Since the rule of Hilary Term, 2 Wm. 4, it was not requisite that a person suing in formâ pauperis should be dispaupered previous to making a similar application to the present. No doubt, previous to the promulgation of that rule, it was requisite to dispauper the person against whom the application was made. In order to do that, some misconduct must be shewn on his part. Since that rule, however, was promulgated, a pauper must be considered on the same footing as any other person who had not proceeded to trial pursuant to his notice. The fact, therefore, of the pauper giving the notice, and not proceeding to trial in pursuance of it, was a sufficient ground for making the plaintiff pay the costs of the day.

TINDAL, C. J.—It appears to me that this rule must be made absolute. The notice of trial has been given in the ordinary way, and the defendants have, in consequence, been put to some considerable expense. The not proceeding to trial arose from a gross mistake; and, though it was occasioned by the clerk to the plaintiff's attorney, the plaintiff must be liable to pay the costs in the usual way.

The other Judges concurred.

Rule absolute.

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C. 2. Cb 3 - 877.

Ross v. Hill.

In an action of assumpsit against the proprietor of a cab for the loss of luggage, the promise of the defendant was alleged to be "safely and securely" to convey the plaintiff and his luggage: *Held*, that this allegation was sustained by the promise implied by law to use due and reasonable care in that behalf, as the allegation must be construed with reference to the character of the bailee sought to be charged.

Byles, Serjt., shewed cause against a rule nisi to set aside the verdict found for the plaintiff, and to enter a nonsuit, pursuant to leave reserved. It was an action of assumpsit against the proprietor of a cab for the loss of a portmanteau.

The declaration stated, that before and at the time of the making of the promise and committing of the negligence by the defendant hereinafter mentioned, and before the commencement of this suit, the defendant was the proprietor of a certain hackney carriage, to wit, a common public hackney cabriolet, which said hackney carriage, during all the time aforesaid, was under the care, management, and direction of a certain servant of the defendant, and before and at the time of the making of the defendant's promise hereinafter mentioned, was standing and plying for hire at a certain place within the limits of the Metropolitan Police District, to wit, the terminus of the Great Western Railway at Paddington, in the county of Middlesex; and thereupon heretofore, and after the passing of a certain act of Parliament, made and passed in the seventh year of the reign of her present Majesty, intituled, "An Act for regulating Hackney and Stage Carriages in and near London," to wit, on the 8th of October, A. D. 1845, the plaintiff, at the request of the defendant, hired the said hackney carriage of the defendant to come and carry the plaintiff and his luggage which he then had with him, to wit, a certain portmanteau of the plaintiff, containing divers goods and chattels of the plaintiff, to wit, &c.; and also one Rebecca Burt, with the luggage she then had with her, to wit, one portmanteau and one box, from the said place, to wit, the said terminus of the Great Western Railway, to a certain other place, to wit, Gerrard's Hall, Basing Lane, in the city of London, and there, to wit, at the last mentioned place, to set down the said Rebecca Burt and her

said luggage, and then to carry and convey the plaintiff and his said luggage from the said last mentioned place to a certain other place, to wit, Bridge Street, Southwark, in the county of Surrey; and thereupon, to wit, on the day and year aforesaid, in consideration of the premises, and that the plaintiff, together with his said luggage, would, at the request of the defendant, become and be a passenger to be carried and conveyed in the said hackney carriage of the defendant as aforesaid, and of certain reward to the defendant in that behalf; he, the defendant, as and being such proprietor of the said hackney carriage as aforesaid, then promised the plaintiff to carry and convey him and his said luggage in the defendant's said hackney carriage, *safely and securely* from the said place, to wit, the said terminus of the Great Western Railway to the said other place, to wit, Gerrard's Hall aforesaid, and at the last mentioned place to set down the said Rebecca Burt and her said luggage, and then to carry and convey the plaintiff and his said luggage *safely and securely* from the last mentioned place to the said other place, to wit, Bridge Street, Southwark, aforesaid. And the plaintiff says, that he, confiding in the said promise of the defendant, did, with his said luggage, then, to wit, on the day and year aforesaid, become and be, and the defendant then accepted and received the plaintiff as such passenger, to be carried and conveyed with his said luggage, in and by the said hackney carriage of the defendant as aforesaid. And the said Rebecca Burt, together with her said luggage, then also became and was a passenger in the said hackney carriage of the defendant. Yet the defendant, not regarding his duty as such proprietor of the said hackney carriage as aforesaid, nor his said promise, did not, nor would carry or convey the plaintiff and his said luggage in the defendant's hackney carriage safely and securely from the said place, to wit, the said terminus of the Great Western Railway to the said other place, to wit, Gerrard's Hall aforesaid, and from thence to the said other place, to wit, Bridge

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Street, Southwark, aforesaid: but, on the contrary thereof, he the defendant being such proprietor of the said hackney carriage as aforesaid, so carelessly and negligently behaved and conducted himself, to wit, by his said servant in that behalf, in and about the premises, that by and through the mere carelessness, negligence, and improper conduct of the said defendant, to wit, by his said servant and not otherwise, part of the plaintiff's said luggage, to wit, one of his said portmanteaus, and the said contents thereof, being of the said value of 20*l.*, afterwards and whilst the plaintiff was being carried and conveyed in the said hackney carriage of the defendant as aforesaid, and before the commencement of this suit, to wit, on the day and year aforesaid, became and was, and is wholly lost to the plaintiff.

The defendant pleaded, amongst other pleas, non assumpsit; on that issue the principal question in the cause arose. The plaintiff did not produce any evidence to shew an express promise "safely and securely" to convey the plaintiff and his luggage, and this being objected to as a variance, it was contended that the allegation was sufficiently sustained by the promise implied by law on the part of the defendant as the proprietor of a cab, as the words of the allegation must be construed with reference to the peculiar character of bailee filled by the defendant. *Tindal*, C. J., before whom the cause was tried, left the case to the jury upon the question of negligence, and they having found for the plaintiff, he reserved leave to the defendant to move to enter a nonsuit. The question then was, whether the promise alleged in the declaration was supported by the promise implied by law from the character of the bailee. It was said that the promise alleged was in fact that of a common carrier, whereas a cab proprietor could not be considered as a common carrier. After the case of *Upshare* v. *Aidee* (*a*), it could not be contended that a cab proprietor was a common carrier. That, however, was not material

(*a*) 1 Comyn. 25.

in the consideration of this question, because the forms alleged the liability of every bailee, whatever his character, in the same manner. Thus the liability of a gratuitous bailee might be alleged in the same manner as that of a bailee for reward, or of a bailee where the bailment was for the advantage of both bailor and bailee, as in the case of a common carrier. The words in the forms used were either "safely," or "safely and securely," wherever it was sought to charge a bailee. As in *Harris* v. *Costar and Others* (*a*), which was an action against coach proprietors for an injury received by the overturning of their coach, and the declaration there alleged, without any qualification, the duty of the defendants to be to carry the plaintiff "safely." On the objection being taken that that allegation meant to convey the plaintiff safely at all events, and that no evidence had been given of such a promise, *Best*, C. J., said, "if it had been the first time that this form had been used, I should have said, that it did not mean that the coach proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care." The older forms were in perfect conformity with this view. Thus in *Clift's Entries*, p. 39, in an action in the time of Charles the Second, against a waterman for negligently conveying goods, whereby they were sunk and injured, the duty of the waterman was alleged to be "salvò et securè," to deliver the said goods. [*Cresswell*, J.—The entry describes the defendant there as communis remex, so that he would appear to be treated as a common carrier.] So in *Rastall's Entries*, 3 b, in an action on the case for the misuse of a crane, the declaration alleged the duty of the defendant to be "salvò et securè per instrumentum predictum absque damno proprietarii bonorum et mercimoniorum predictorum cranare." Again, at page 8 of the same book, the liability of the defendant to keep his fire in

(*a*) 1 C. & P. 636.

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such a way as to prevent injury to his neighbour, was described to be "salvò et securè custodire." In the same page, the liability of a lender of money on the security of a pledge, to take care of the pledge, is described in the same language. At page 9, in a declaration for the negligent keeping of a purse, the liability of the defendant was described to be "ad salvò custodiendam cistam prædictam." In a declaration for the detinue of charters at page 209, b, the word "salvò" was used in a similar manner. So in *Brown's Entries*, p. 80, in an action against an innkeeper for negligently keeping a gelding. There, the duty of the innkeeper was described to be "salvò et securè custodire." Again, in *Brownlow Redivivus*, p. 13, in an action against an innkeeper for the loss of a purse and money, the duty of the innkeeper was described to be "salvò et securè custodire." So in the *Register Brevium*, p. 108, those words were used in describing the liability of a person who had undertaken to convey goods in a certain vessel, but which, through his negligent navigation, had become lost. At page 110, the same words were employed in describing the promise of a person who had undertaken to convey a pipe of wine, but which, through negligence, was staved, and the greater part of the wine lost. Those words were also used in *Coggs* v. *Bernard* (*a*). It would also be found that the modern precedents pursued the old forms; thus in 2 *Chit. on Pleading*, p. 211, 6th ed., in an action against a bailee without reward, the promise of the bailee was alleged to be "safely and securely" to keep the said goods. The declaration in *Beauchamp* v. *Powley* (*b*), in the second count alleged that the plaintiff caused a parcel to be delivered to the defendant, to be kept and "securely conveyed and delivered for the plaintiff;" that was an action against a stage coachman for the loss of a parcel. There, Lord *Tenterden* said, "If the jury are of opinion against the defendant on the question of fact, which I shall leave

(*a*) 2 Ld. Raym. 909; S. C. 1 Salk. 26; 2 Salk. 733; 3 Salk. 11.

(*b*) 1 M. & R. 38.

to them, I think the first and second counts will apply to the case." No motion appeared to have been made in that case to review the opinion of Lord *Tenterden*. In *Dudley* v. *Smith* (*a*), which was an action against a stage coach proprietor for his driver's negligence, the liability of the defendant was described to be "safely and securely to convey the plaintiff." In *Brind* v. *Dale* (*b*), where it was held that the plaintiff was not liable as a common carrier, yet his liability, which was that of a private carrier, was described in the declaration to cause to be taken care of and "safely carried." So in *Cairns* v. *Robins and Another* (*c*), which was an action against carriers, who were charged as warehousemen, the promise of the defendants was alleged to be "that they would safely and securely keep the said packages." This having been the universal form of alleging the liability of a bailee in whatever character he might be sued, the present declaration was sufficient, and supported by the evidence.

Dowling, Serjt., (*G. Atkinson* with him) in support of the rule. The question in this case was one of variance, and was, therefore, distinguishable from *Coggs* v. *Bernard*, where the judgment proceeded upon an objection on the face of the declaration. Here, it was alleged, that the defendant had undertaken "safely and securely" to convey the goods. The promise was in fact that of an insurer. The liability of the proprietor of a cab was not even so extensive as that of a common carrier, still less did it amount to that of an insurer; the allegation, therefore, in the declaration could not be considered as sustained by proving that he had contracted in the character of cab proprietor. With respect to the older precedents cited, it was consistent with them that the promise of the defendant was express, and founded on an executory consideration.

(*a*) 1 Campb. 167.
(*b*) 8 C. & P. 207; S. C. 2 M. & Rob. 80.
(*c*) 8 M. & W. 258.

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In the precedent from *Clift*, the defendant was described as communis remex, and therefore was a common carrier; *Bac. Ab.* tit. "*Carrier*," (A). The case from *Rastall* was previous to 6 Ann. c. 31, s. 6, made perpetual by 10 Ann. c. 14, s. 1, when the words "salvò et securè" would properly have been used, as persons were then liable even for accidental fire; *Bac. Ab.* tit. "*Action on the case*," p. 85; *Turbervill* v. *Stamp* (*a*). According to the authorities prior to *Coggs* v. *Bernard* (*b*), it appeared that bailees were in all cases bound safely and securely to keep goods which were entrusted to them. That was the decision in *Southcote's case* (*c*). The Court there held that it was a bad plea to a declaration in detinue that the plaintiff had delivered certain goods to the defendant to be kept safe, and, after the delivery, one J. S. stole them out of his possession. The precedents cited were in conformity with the then state of the law, but *Southcote's case* was overruled by *Coggs* v. *Bernard*. Since the latter case, the nature of the bailment regulated the liability of the bailee, and did not leave all bailees upon the same footing. It was therefore requisite, that the allegation of the bailee's promise should vary according to the character he filled. In the case of *Kettle* v. *Bromsall* (*d*), the distinction between "safely" and with "due care," was recognized by the Court. There, the declaration alleged that goods had been delivered to the defendant to be safely kept, and the defendant pleaded "that they were delivered to him to take care of them as his own proper goods," and that they were stolen from him. The Court there says, "If the goods were delivered to him to be kept safely, though the defendant had been robbed of them, yet detinue will lie, for he must take his remedy against the thief or the hundred as he can. But if the goods were delivered to the defendant to take care of them

(*a*) 1 Salk. 13.

(*b*) 2 Ld. Raym. 909; S. C. 1 Salk. 26; 2 Salk. 733; 3 Salk. 11.

(*c*) 4 Rep. 84, a.

(*d*) Willes, 118.

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as his own proper goods, if he be robbed of them, that is a good plea." In the modern forms it was by no means the universal practice to apply the words "safely and securely" indifferently to all cases of bailment, as appeared in the forms collected in 2 *Chit. on Pleading*, 213, 214, 6th ed. The former was the case of an action against a pawnbroker who had lost a pledge: the latter against the hirer of a horse for improperly riding it. In *Coggs* v. *Bernard*, there was nothing to shew on the face of the declaration that the consideration was not executory, and the promise express. [*Cresswell*, J.—No member of the Court appears to have treated that case as one of express contract.]

TINDAL, C. J.—In this case, the question is, whether the promise laid in the declaration is one which the law will imply from the relation between these parties; for there is no pretence for saying that there was any express contract between them. And, perhaps, if the words of the declaration were very strictly construed, they state a promise which the law would not imply; but then arises the question, whether the words of the declaration may not be understood in a more limited signification with reference to the relation of the parties as it appeared at the trial; and I think that they may be so construed. A long series of precedents exists, and many of them have been cited at the Bar to-day, in all of which are used, the same words "safely and securely" which appear in this declaration. One cannot suppose, that in all the cases put, actual express agreements had been made between the parties; it must, therefore, be, that the law has settled that this mode of declaring, although incorrectly stating the promise, if the strictest construction be applied to the expressions used, yet, with reference to the subject-matter, rightly describes what the duties of the parties are. Thus, in the precedents cited from *Rastall*, in actions for fire, and for the improper craning of goods, this allegation is made; and yet in neither of these cases is the duty implied by law, that which those

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words would, if accurately and strictly construed, express. Here the plaintiff hires a cab to convey himself and his luggage; and he alleges the promise of the defendant to be to carry and convey him and his said luggage in the defendant's hackney carriage "safely and securely." Now, I think that this promise is to be construed with reference to the care and caution which the law imposes as a duty on the defendant. He is bound to exercise a due and reasonable care of his passenger's person and luggage. If it had appeared at the trial that the defendant was not a cabman, but a common carrier, the promise would have been still higher. A common carrier is only excused by the act of God or of the Queen's enemies, from safely delivering goods entrusted to his care. If, on the other hand, the defendant had been a gratuitous bailee, he would only have been liable in respect of gross negligence; and yet the mode of declaring in all these cases would be the same, the allegation being understood in each case respectively with reference to the duty which the law implies. And I cannot help thinking, that this was in fact decided in *Coggs* v. *Bernard* (*a*). There was no objection raised in that case, that there was no evidence of the contract laid in the declaration; but that there was no consideration to support it. The Court held that there was a sufficient consideration, Lord *Holt* saying, that "the owner's trusting the defendant with the goods was a sufficient consideration to oblige him to a careful management." And so the declaration which laid the promise of the defendant safely and securely to take up the brandy, &c., and safely and securely to lay it down again, was held to be good. For these reasons I think this rule must be discharged.

COLTMAN, J.—I am of the same opinion. Although, undoubtedly, the natural meaning of the words "safely and securely" is that put upon them by my Brother *Dowling* in the course of his argument, yet the judicial construction

(*a*) 2 Ld. Raym. 909; S. C. 1 Salk. 26; 2 Salk. 733; 3 Salk. 11.

which they have received is that stated by Chief Justice *Best* in the case of *Harris* v. *Costar* (*a*), where his Lordship says that he understands these words to mean "not that the coach proprietor would insure the limbs of his passengers, but that he would take due care." And this ruling is confirmed by the old precedents upon the subject, from which it appears that the usual course of declaring has been that adopted in the present case. It seems to me, therefore, that we may fairly say that the legal understanding of these words puts upon them a sense with reference to the subject-matter of the contract; and that, construed thus, the declaration accurately sets forth the promise which the law implies.

CRESSWELL, J.—I am of the same opinion. Authorities, principle, and good sense concur in favour of the plaintiff. The case of *Harris* v. *Costar* is expressly in point, and a long course of precedents also shew that the words used in this declaration do not import the meaning which their strict construction by themselves would impose, but that they are to be viewed with reference to the character of the contracting parties. Take the case of a common carrier. Even in his case, although his liability is stated in the declaration to be "safely and securely" to carry and convey the goods entrusted to him, and "safely and securely" to deliver them, yet he is not bound to deliver at all events; the law does not suffer his liability to attach where the loss has occurred by the act of God or the King's enemies. In the case of a bailee without reward, the exception is still wider. Where some reward is given, the exception is one between these two cases. In *Coggs* v. *Bernard*, Lord *Holt* says, "Suppose the bailee undertake safely and securely to keep the goods in express words, yet even that would not charge him with all sorts of neglects;" and he quotes for that position, *Doctor and Student*, 130. And it

(*a*) 1 C. & P. 636.

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may be observed, that the declaration in *Coggs* v. *Bernard* (*a*), alleged a certain consideration, as supporting an undertaking safely and securely to raise up and put down certain brandy. After verdict for the plaintiff, it was proved, in arrest of judgment, that there was no consideration sufficient to sustain the promise; but "I answer," says Lord *Holt*, "that the owner trusting him (the defendant) with the goods, is a sufficient consideration to oblige him to a careful management." Lord *Holt*, therefore, upholds the declaration, and construes the allegation in the declaration as one equivalent to a promise to use careful management. If the same principle be applied to the present case, it decides it in favour of the plaintiff.

Erle, J.—I agree with the rest of the Court in the judgment they have pronounced. It was contended, on behalf of the defendant, that the meaning of the promise laid in the declaration was, that the defendant undertook to convey the plaintiff and his luggage safely and securely at all events; but that is not the construction put by the precedents upon the words "safely and securely:" in this case they would rather import a promise to convey, with a due attention to safety. The degree of attention or care varies according to the nature of the bailment. Construing the allegation in this case with reference to the nature of the contract proved at the trial, I think all that it means is, that the defendant undertook to use reasonable care and diligence. The jury, it seems, found that he did not use such care.

Rule discharged.

(*a*) 2 Ld. Raym. 909; S. C. 1 Salk. 26; 2 Salk. 733; 3 Salk. 11.

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STROUD *v.* WATTS. *J. C. 2 Ch 3 - 929*

SIR *T. WILDE*, shewed cause against a rule obtained by *Byles*, Serjt., for setting aside a certificate made in pursuance of the 3 & 4 Vict. c. 24, s. 2, and all proceedings thereon. It was an action on the case for a malicious prosecution. Judgment by default having been suffered by the defendant, and the venue being in Wiltshire, a writ of inquiry was sued out directed to the sheriff of that county. It was accordingly executed before the under sheriff, Mr. Palmer, and the jury having returned a verdict for 1*l.* 1*s.*, an application was made to the under sheriff for his certificate under the 3 & 4 Vict. c. 24, s. 2. The words of that section are, "that if the plaintiff in any action of trespass, or of trespass on the case, brought," &c., "shall recover, by the verdict of a jury, less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the Judge or presiding officer, before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious." The under sheriff accordingly made his certificate in this form: "I certify that the grievance within complained of was wilful and malicious." Signed, "Jacob Pleydell Bouverie, commonly called Viscount Folkestone, sheriff." The return to the writ was also signed "Jacob Pleydell Bouverie, commonly called Viscount Folkestone." The plaintiff afterwards gave notice of taxation; and before the Master it was contended that he was not entitled to his costs, on the ground that the certificate was not signed by

Where an under sheriff, before whom a writ of inquiry is executed, certifies under the 3 & 4 Vict. c. 24, s. 2, he may do so in the name of the high sheriff; and *semble*, that it ought not to be signed in his own name.

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the presiding officers; as the under sheriff, and not the sheriff, had presided at the execution of the inquiry. The Master however, taxed the plaintiff his costs at 69*l.* 5*s.* 3*d.*; and the present rule was obtained to set aside the certificate and all subsequent proceedings. The question was, whether the under sheriff had properly signed the certificate in the name of the high sheriff. It was contended, that the under sheriff had signed it properly. The under sheriff was acting in the name of the high sheriff and all the acts of the former were presumed to be the acts of the latter. Thus, where a bail bond was taken, and it was afterwards assigned by the under sheriff, he did so in the name of the high sheriff. So here, the writ of inquiry was directed to the high sheriff, and proceedings upon it took place in his name. In the present case, if the certificate had been signed in the under sheriff's own name, there would have been an incongruity between the record and the certificate. In *The Queen* v. *Dunn* (*a*), this principle was recognised. There, the defendant was indicted for perjury, alleged to have been committed on a writ of trial, and the indictment stated the trial to have taken place before the high sheriff. It was proved, that when the defendant gave evidence on the writ of trial, neither the high sheriff nor the under sheriff was present, but that the writ of trial was executed before Mr. S., the sheriff's assessor, who was proved to have been in the constant practice of acting as the sheriff's assessor and deputy; but the writ of trial was directed to the sheriff, and it was stated in the postea, that the trial took place before him. It was there held by a majority of the Judges, that the allegation in the indictment was supported. If any distinction could be raised between that case and the present, it was, that a party could not be allowed to falsify a record; but that was not the ground on which the opinion of the Judges proceeded. The only character in which an under sheriff could be recognised by the Court was that of an

(*a*) 1 Car. & K. 730.

officer performing the duties of the high sheriff, in the name of the high sheriff. He had no right in the office except that which he possessed in the character of an agent acting in the name of his principal. In *Bac. Ab.* tit. "*Sheriff*" (H.) it was laid down that "the high sheriff may execute the office himself, and the under sheriff hath not, nor ought to have any estate or interest in the office itself; neither may he do anything in his own name, but only in the name of the high sheriff, who is answerable for him." [*Cresswell*, J. —It appears from *Com. Dig.* tit. "*Viscount*" (B. 1.) that the sheriffs, from the earliest times, appointed under sheriffs]. No doubt, but they were not bound to do so; *Norton* v. *Simmes* (*a*). If, therefore, the certificate had been signed in any other manner it would have been incorrect.

Byles, Serjt., in support of the rule. The question in the present case depended on the construction to be put on the 3 & 4 Vict. c. 24, s. 2, in conjunction with the 3 & 4 Wm. 4, c. 42, ss. 17 and 18. By the latter statute the under sheriff appeared to be recognised as an independent officer authorised to perform certain judicial acts, in the case of writs of trial. The Legislature must be presumed to be aware of the provisions of the earlier act, when it passed the later one; and must, therefore, be presumed to have treated him as an independent officer when he was authorized to grant the certificate. It ought, therefore, to have been signed by the under sheriff himself. If it should be held, that a certificate signed as in the present case would suffice, the high sheriff, who was unaware of any of the facts of the case, and who, therefore, would not have the means of determining the propriety of granting such a certificate, might grant it. This would clearly be contrary to the intention of the Legislature. The case of *The Queen* v. *Dunn* was distinguishable from the present, as there, the party could not be allowed to aver against the record.

(*a*) Hob. 12.

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[*Cresswell*, J.—It appears that the decision in that case proceeded on the ground of variance and not of estoppel. But in this case, the defendant, in order to succeed, must contradict the record in stating, that the sheriff himself did not sign the certificate. Here, the record states that the trial took place before the sheriff, and the certificate purports to have been granted by him.] The certificate could not be considered as any part of the record, and, therefore, it was no contradiction of the record to require the certificate to be signed by the under sheriff, though the return to the writ might be in the name of the high sheriff.

TINDAL, C. J.—I think the certificate is sufficient. The return to the inquisition ought to be made in the name of the sheriff, as appears from *Plowden*, 63, where it is said, "and always when the writ is returned, the name and surname of the sheriff ought to be put to the return: and so he ought to have done here, for there is a common diversity holden at moots in Courts and Chancery, that the writ shall be directed to the sheriff of such a county generally, without naming his name, but he ought to put his name to the return." This is founded upon the statute 12 Edw. 2, c. 5, which provides, "that from henceforth sheriffs and other bailiffs that receive the King's writs returnable in his Court, shall put their own names with the returns, so that the Court may know of whom they took such returns, if need be. And if any sheriff or other bailiff leave out his name in his return, he shall be grievously amerced to the King's use." Thus, where in point of fact the writ is awarded to the sheriff, and the return is made by him, he is the proper person in whose name the certificate should be given. I see no reason why the under sheriff should sign his name in preference to that of the person whom he is representing. If, in fact, there had been any abuse, and the certificate had been given by the person who did not preside, we might have interfered; but, in the

absence of any suggestion of the sort, I think the return and the certificate ought to run on in uniformity, which would not be the case if the latter were signed by the under sheriff. Such a variance might, indeed, have been assigned as error in the proceeding. As this is a speculative motion the rule will be discharged, with costs.

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STROUD v. WATTS.

COLTMAN, J., CRESSWELL, J., ERLE, J., concurred.

Rule discharged, with costs.

GORDON and Others *v.* ELLIS and Another. *3C 2CB. 821.*

ASSUMPSIT for money had and received to the use of the plaintiffs, and upon an account stated. The defendants pleaded, thirdly, except as to 160*l.*, that, before the said money in the declaration mentioned had been had or received by the defendants, and also before the stating of the said account in the declaration mentioned, or either of them, to wit, on &c., the plaintiffs carried on the trade and business as founders, in partnership together, as co-partners. And thereupon, while they the said plaintiffs continued to be and were such partners as aforesaid, to wit, on the day and year aforesaid, the said plaintiff, Gordon, with the privity and concurrence of the other plaintiffs, applied to and requested the defendants, who then carried on, and still continue to carry on, in partnership together, the trade and business of auctioneers and appraisers, and also then retained and employed them the said defendants as such auctioneers, to put up to sale and dispose of certain property of and

In an action for money had and received by several plaintiffs, the defendants pleaded, that before receiving the money the plaintiffs were in partnership, and that G., one of the partners, with the privity of the others, employed the defendants as auctioneers to put up to sale certain partnership property of the plaintiffs, which the defendants agreed to do; that at the time of such employment

and sale the defendants believed G. to be the sole owner of the said property, and that they had no notice that the other plaintiffs had any interest therein; that the defendants sold the goods for the sums of money in the declaration mentioned; and that after such employment, G. became indebted to the defendants for work and labour, &c., which debt was alleged by way of set-off: *Held*, on demurrer, that the plea was bad, as there was nothing to shew that the partner appeared as the sole owner with the consent or by the default of the other partners; it was therefore only an attempt to set off a debt due from one partner against a debt due to all.

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belonging to the said plaintiffs as such copartners as aforesaid, which they the said defendants then assented and agreed to do. That at the time when the said Gordon applied to and requested the defendants to sell and dispose of the said property, and also at the time of their selling and disposing thereof, and at the times when the debts and moneys hereinafter mentioned to have been due from the said Gordon to the said defendants, became and were due, and were incurred as hereinafter mentioned, they the defendants, believed that the said Gordon was the sole and exclusive owner of the said property, and had full power, and lawful and absolute authority, to sell and dispose of the same, and receive the proceeds thereof, as and for his own property, and for his own sole use, benefit, and advantage, they, the defendants, then having, and they in fact say that they then had, no notice or knowledge whatsoever that the said other plaintiffs, or any other person whatever, had any right, title, estate, or interest whatever in the said property, or any part thereof. And, further, that they the said defendants afterwards, to wit, on the day and year aforesaid, sold and disposed of the said property for certain sums of money, being the same identical moneys in the declaration above mentioned; and for which this action is brought; and that after the said Gordon had so retained and employed the defendants as aforesaid, and before the said defendants or either of them had any notice that the said Gordon was not the sole and exclusive owner of the said property, or of the proceeds thereof, or any part thereof, and before and at the commencement of this action, to wit, on, &c., the said Gordon became and was, and ever since has been, and still is indebted to the defendants in a large sum of money, to wit, the sum of 5000*l.* for work and labour of the defendants before then done and performed by the said defendants for the said Gordon at his request, and for money lent by the defendants to the said Gordon at his like request, and for money paid by the defendants for the use of the said Gordon at his like request, and for money found to be due to the

defendants from the said Gordon on an account then stated between them, which sum of money, so due to the defendants from the said Gordon as aforesaid, exceeds the said moneys in the declaration mentioned, except as aforesaid, and out of which said sum the defendants are ready and willing, and hereby offer to set off and allow the full amount of the said moneys in the declaration mentioned, except as aforesaid.—Verification.

Replication, that at the time of the selling and disposing of the said property in the said third plea mentioned, as therein alleged, the defendants had knowledge that the said Gordon was not the sole and exclusive owner of the said property, in manner and form as in the said third plea alleged.

To this replication, the defendants demurred generally. The points stated for argument were, that the replication contained no answer to the plea, for that the defendants were entitled to set off against the plaintiffs' demand the debt due to them from Gordon, provided they had no notice that he was not the sole owner of the property mentioned in the plea, either at the time when they were retained to sell it, or at the time when their set off against him accrued, (all which the replication admitted), and that their right of set-off could not be affected by their subsequently, before the actual sale of the property, discovering that Gordon was not the sole owner, which was all the replication alleged.

Joinder in demurrer.

Byles, Serjt., (*Willes* with him) for the defendants. This case had already been before the Court in Trinity Term, 1844 (*a*), when the Court awarded a repleader. The validity of the third plea was now the question. The plea was founded on the well recognised rule, that if an agent is permitted by his principal to deal with goods as his own, when the principal is disclosed, the party dealing with the

(*a*) *Ante*, vol. 2, p. 308; S. C. 8 Scott, N. R. 290; 7 M. & G. 607.

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agent has a right to be placed in the same situation, with reference to the principal, that he was in with reference to the agent. This rule had been laid down and acted on in the cases of *Rabone* v. *Williams* (*a*); *George* v. *Clagett* (*b*); *Stracey and Others* v. *Deey* (*c*); and *Carr* v. *Hinchliff* (*d*). So in *Sims* v. *Bond* (*e*), Lord *Denman* says, "it is a well established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party." The defendants, therefore, had a right to set off the debt due to them from Gordon against the plaintiffs' claim. [*Tindal*, C. J.—The plea does not disclose that the other partners allowed Gordon to appear as the owner of the property]. The plea did not contain an express allegation to that effect, but it was alleged that Gordon, with the privity and concurrence of the other plaintiffs, applied to and requested the defendants to put up to sale and dispose of certain property belonging to the plaintiffs. This was an allegation equivalent to the one suggested by the Court. As, therefore, the other partners of Gordon did not appear to the defendants to be interested in the property, the defendants had a right to avail themselves of their set-off against the plaintiffs' demand, unless, indeed, the defendants were guilty of any default, and if they were, that ought properly to be replied. [*Cresswell*, J.—You want to apply the principle of *Carr* v. *Hinchliff*, and *George* v. *Clagett*, where the person employed to sell has been held out as the owner by the person entitled to the property, to the present case, which is only that of one partner employing an auctioneer to sell the partnership goods]. Suppose it had been stated that Gordon had employed the defendants to sell, as

(*a*) 7 T. R. 360, note (*a*).
(*b*) Ib. 359.
(*c*) Ib. 361, note (*c*); S. C. 2 Esp. 468.
(*d*) 4 B. & C. 547; S. C. 7 D. & R. 42.
(*e*) 5 B. & Ad. 389; S. C. 2 N. & M. 608.

being the sole and true owner of the property. [*Cresswell*, J. —That would not have been sufficient, unless it was shewn to have been done with the consent of the other partners].

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Channell, Serjt., (*Bovill* with him,) appeared for the plaintiffs, but was not called upon by the Court.

TINDAL, C. J.—Here there is no allegation that Gordon appeared to the defendants as the sole owner of the property either with the consent of the other partners, or by reason of any default on their part. It is, therefore, not brought within the case of *Stracey and Others* v. *Deey*, and there is nothing to take it out of the general rule applicable to a set-off. It is in effect only a set-off of a debt due from Gordon to the defendants against a debt due from them to the partnership firm, which is not allowable. Judgment on this plea must accordingly be given for the plaintiffs.

COLTMAN, J., CRESSWELL, J., and ERLE, J., concurred.

Judgment for the Plaintiffs.

JEFFERIES *v.* YABLONSKI.

6 C. B. 924

BYLES, Serjt., shewed cause against a rule obtained by *Dowling*, Serjt., to set aside the issue and notice of trial in this case for irregularity. It was an action of debt for board, maintenance, education, clothes, and other necessaries supplied to the defendant's child, and also for money due on an account stated. Pleas; first, nunquam indebitatus: second, a set-off. The pleas, requiring the signature of a serjeant, were duly signed. An order for a writ of trial was

The signature of counsel to special pleas need not be stated in making up the issue.

The issue on a writ of trial need not state the day of the return, but should state the teste of the writ.

The Court will not, however, on account of that omission, set aside the issue, but will direct it to be amended, at the cost of the plaintiff.

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afterwards obtained, and the issue made up. The pleadings were regularly copied, but the signature of the serjeant to the pleas was omitted. The issue then proceeded: "and, forasmuch as the sum sought in this suit and indorsed on the said writ of summons does not exceed 20*l.*, hereupon, on the day of , 1846, pursuant to the statute in that case made and provided, the sheriff is commanded that he summon twelve, &c., who neither, &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly; and, when the same shall have been tried, that he make known to the Court here what shall have been done, by virtue of the writ of our Lady the Queen to him in that behalf directed, with the finding of the jury thereon indorsed, on the day of , &c."

To the issue in this form three objections were taken: first, that the serjeant's signature was omitted in copying the pleas; secondly, that the date of the teste of the writ was omitted; and thirdly, that the date of the return was also omitted. With respect to the first objection, there was no authority for requiring the plaintiff, in making up the issue, to copy in the name of the counsel who had signed the pleas. The object of the signature was to give that sanction to the pleas; and, having fulfilled that purpose, there was no necessity for introducing it on the record. A rule of Court of Easter Term of 18 Car. 2, K. B. was made, by which the clerk of the papers was required to write the name of the counsel by whom the pleas were signed, but that rule had never been adopted in the practice of the Common Pleas, and the rules of Hilary Term, 4 Wm. 4, did not require it. Next with respect to the omission of the teste of the writ. If that was an objection, the proper mode of taking advantage of it was by application to the other side to amend, or by a summons at Chambers for that purpose, and not by coming to the Court, thus unnecessarily incurring costs. That this was the proper course

appeared from the cases of *Iken* v. *Plevin* (*a*), and *Hart* v. *Dally* (*b*). In the latter case, on a similar application to the present, the Court of Exchequer directed that an application should be made to the opposite party to amend, and, in the former, it was held that a wrong statement of the date of the writ of summons in the issue was not a ground for setting the issue aside, but was a matter to be disposed of by summons at Chambers. Then with respect to the third objection, the plaintiff could not know at the time he obtained the order for the writ of trial when it would be returnable, and therefore could not fill up the blank in the form given by the rule.

Dowling, Serjt., in support of the rule. The issue was intended to be a complete transcript of the pleadings in the cause. The pleas, however, were not perfect without the signature of counsel, and, therefore, unless there was a transcript of the counsel's name, there was not a complete transcript of the pleadings. The practice required that this should be done, for it was laid down in *Chit. Archb.* p. 200, 7th ed., "that the declaration and pleadings must be correctly copied in the issue, each forming a separate paragraph; and, under the special pleas, &c., the names of the counsel by whom they are signed should be inserted." On examination of the records, it would be found that the names of the counsel were regularly introduced. It was but reasonable that the names of counsel should be introduced, as without them the plaintiff would be entitled to treat the plea as a nullity, and sign judgment as for want of a plea. [*Cresswell*, J.—If a plea were delivered without the signature of counsel when required, and the plaintiff, instead of signing judgment, replied, would he be at liberty afterwards to object to the plea, on the ground that the signature had been omitted.] Perhaps not; but that by no means shewed that when the defendant's plea was signed

(*a*) 5 Dowl. 594.

(*b*) 2 Dowl. 257.

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by counsel, and the plaintiff made up the issue, that he was not bound to copy the name of the counsel when he copied the pleadings. Then as to the omission of the teste of the writ of trial, the case of *Peel* v. *Ward* (*a*) was a clear authority to shew that the form of issue given by the rules of Hilary Term, 4 Wm. 4, must be strictly pursued. In that form, a blank was left for the teste of the writ, and a direction given that the teste should be introduced. Here, no teste having been introduced, the issue was defective. There was no express authority deciding that the omission amounted to an irregularity, for which the issue must be set aside; but in *Dennett* v. *Hardy* (*b*), *Patteson*, J., said, "I am rather inclined to think that the order for the writ of trial ought first to be obtained, and if it be, the dates could then be inserted; and, looking at the form given by the rule, it seems to me that that ought to be done. At the same time, it is not necessary to decide the point now, as the plaintiff being obliged to amend the other defect, he can amend this also." This case was a strong intimation of the learned Judge's opinion as to what ought to be done by the plaintiff under such circumstances, and on principle it would seem that the defect should be regarded as an irregularity. Then as to the mode of proceeding adopted by the defendant in coming to the Court instead of applying at Chambers, the case of *Dennett* v. *Hardy* was an authority to shew that the defendant might come to the Court to have the issue amended at the costs of the plaintiff, without applying at Chambers. *Lycett* v. *Tenant* (*c*) was to the same effect. [*Cresswell*, J.—In the case of *Watts* v. *Ball* (*d*), the Court allowed the issue to be amended on payment of costs, by inserting the date of the teste and the return on the writ of trial, blanks for them having been left in the writ.] That was an authority to

(*a*) 5 Dowl. 169; S. C. 1 M. & W. 743.
(*b*) *Ante*, vol. 2, p. 488.
(*c*) 4 Bing. N. C. 168; S. C. *nom. div.* 5 Scott, 479; 6 Dowl. 436.
(*d*) 8 Dowl. 589; S. C. 1 Scott, N. R. 173; 1 M. & G. 906.

shew that in such a case the plaintiff ought himself to come to the Court and apply for an amendment at his own costs. Lastly, with regard to the omission of the date of the return, the same authorities and arguments tended to shew that the defect amounted to an irregularity, and that the plaintiff was right in the course he had pursued, in order to take advantage of it.

TINDAL, C. J.—The first objection to this issue is, that the name of the serjeant signing the pleas has not been inserted, but this does not appear to me to be a valid objection. If we look at the form of the issue as prescribed by the rule of Hilary Term, 4 Wm. 4, it will be seen that the directions are, "copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue." So that the directions are entirely silent about inserting the name of the counsel signing the pleas; and, as it is clear that the rule of Easter Term, 18 Car. 2, required the name of the counsel so signing to be put on the record, it is but fair to say, that the absence of any requisition of that sort in the rule of Hilary Term, 4 Wm. 4, justifies us in saying that the want of such name cannot be made a good ground of objection. It is moreover, obvious, that all the advantage of the rule has been obtained by the signature having been put to the pleas when delivered. With regard to the second objection, I cannot but say, that upon looking to the form of issue to be tried by the sheriff, as given by the rule of Court, it does seem that the teste of the writ of trial is required to be given; for though it is silent as to the blank with regard to the return, it contains in the blank given for the teste the words "teste of writ of trial." I do not, however, think that the last objection, namely, that the return of the writ is in blank, is a valid one, for it may be impossible, at the time the issue is delivered, for the plaintiff to know when the writ of trial will be returnable. The question then is, how is this rule to be disposed of? It appears to me that the defendant

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had no right to come here and ask for the issue to be set aside, but that his proper course was to call upon the plaintiff to amend the issue at his expense, and not to seek to burthen him with unnecessary costs. On the whole, it seems to me that it will be just that the present rule should be discharged without costs, the plaintiff amending the issue by inserting the teste of the writ of trial, and paying the costs of such amendment.

COLTMAN, J.—With respect to the first objection, the defendant has no right to require the signature of the counsel to be put on the roll. As to the second objection, it appears that the teste of the writ of trial is required to be inserted in the issue, and I think there can be no difficulty in inserting it; for, although the writ of trial does not, in practice, issue until a few days before the trial takes place, still the plaintiff must be aware when it is to be sued out, and may, therefore, well state it in the issue. I am, therefore, for the reasons already given, disposed to think that it ought to be inserted: it has, however, never before been so decided. The case from which the opinion of my Brother *Patteson* has been read, was not an express decision upon this point; and, therefore, there is no authority for throwing the costs of this application upon the plaintiff. The defendant might have returned the issue; but, instead of doing so, he allows further costs to be incurred, and does not apply to a Judge at Chambers to have the issue amended, as he ought to have done. I therefore think that justice will best be done by discharging this rule, upon the terms mentioned by my Lord.

CRESSWELL, J.—I am of the same opinion. I should be disposed to treat this issue rather as a defective issue, than as an irregular issue.

ERLE, J.—The rule of Court says, that the issues "shall be in the several forms in the schedule hereunto annexed,

or to the like effect, mutatis mutandis; provided that, in case of non compliance, the Court or a Judge may give leave to amend." The rule, therefore, seems to contemplate a remedy for any non compliance with the form, by allowing an amendment to be made; and the proper course would have been, in this case, to apply to have the issue amended.

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Rule discharged accordingly.

HARRIS *v.* ROBINSON. 1C 2Cb. 900

BYLES, Serjt., shewed cause against a rule obtained by *C. Jones*, Serjt., for setting aside an appearance entered by the plaintiff for the defendant to a writ of summons, according to the statute. The writ was served on Monday, the 6th of April, and the appearance entered on the 16th. Easter Sunday was on the 12th. The objection was, that the days between the Thursday before and the Wednesday next after Easter Sunday had not been omitted from the calculation. The terms of the rule of Easter Term, 2 Wm. 4, were, "that the days between the Thursday next before, and the Wednesday next after, Easter day, shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial and notices of inquiry in any of the Courts of law at Westminster." Since the promulgation of that rule, however, the 2 Wm. 4, c. 39, s. 11, had passed, and by that it was provided, "that if any writ of summons, capias, or detainer, issued by authority of this act, shall be served or executed on any day, whether in Term or Vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in Term or Vacation: provided always, that if the last of such eight days shall in any case happen to fall on a Sunday, Christmas Day, or

Since the 2 Wm. 4, c. 39, s. 11, the days between the Thursday before, and the Wednesday after, Easter day, are to be reckoned in calculating the time for appearance to a writ of summons, notwithstanding the Reg. Gen. H. T. 2 Wm. 4.

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any day appointed for public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter day, then in every such case the Wednesday after Easter day shall be considered as the last of such eight days." The days in question, therefore, were to be reckoned in such cases as the present, and, consequently, the appearance for the defendant had not been entered too soon. The statute must be considered as repealing the rule of Court.

C. Jones, Serjt., in support of the rule, contended, that the provisions of the statute were consistent with the continuance of the rule of Court in force. In *Harrison* v. *Tait* (*a*), which was decided in Easter Term, 1 Vict., a replication was delivered on Wednesday the 11th of April, Easter Sunday falling on the 15th: the defendant delivered a demurrer on Wednesday the 18th, and the Court held that it was in due time under the rule of Easter Term, 2 Wm. 4. That was an authority to shew that the statute had not abrogated the rule. [*Erle*, J.—The statute applies only to the case of appearances.]

TINDAL, C. J.—On the principle that *leges posteriores priores contrarias abrogant*, I think that this appearance must be considered as not entered too soon, for this statute must be held to have abrogated the rule upon this subject. The case of *Harrison* v. *Tait* was one to which the statute did not extend. The present rule must be discharged, with costs.

Rule discharged, with costs.

(*a*) 4 Bing. N. C. 443; S. C. 6 Scott, 283; 6 Dowl. 611.

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LUARD and Another *v.* BUTCHER and Others.

1 C 2 Cb. 858.

KINGLAKE, Serjt., moved for a rule nisi to arrest the judgment or stay the proceedings in this cause, on the ground that the form of issue given by the 8 & 9 Vict. c. 109, s. 19 (*a*), had not been adopted. A feigned issue had been directed under the 1 & 2 Wm. 4, c. 58, (the Interpleader Act), for the purpose of ascertaining who was

Where a feigned issue is directed under the Interpleader Act, to try the property in certain goods, it may still be framed in the form of a pretended wager, notwithstanding the provisions of the 8 & 9 Vict. c. 109, ss. 18 and 19, although a new form of issue is given by the schedule to the latter section.

(*a*) The following are the sections of the 8 & 9 Vict. c. 109, referred to.

Sect. 18. "And be it enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

Sect. 19. "'And whereas many important questions are now tried in the form of feigned issues, by stating that a wager was made between two parties interested in respectively maintaining the affirmative and the negative of certain propositions; but such questions may be as satisfactorily tried without such form;' be it therefore enacted, that in every case where any Court of law or equity may desire to have any question of fact decided by a jury it shall be lawful for such Court to direct a writ of summons to be sued out, by such person or persons as such Court shall think ought to be plaintiff or plaintiffs, against such person or persons as such Court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this act annexed, with such alterations or additions as such Court may think proper; and thereupon all the proceedings shall go on and be brought to a close in the same manner as is now practised in proceedings under a feigned issue."

(The form referred to in Schedule 2 of the act.)

"In the Court of Queen's Bench (Common Pleas or Exchequer)

"(*or in any inferior Court as the case may be*).

"Middlesex to wit, (*or such other county as may be directed.*)

"Whereas A. B. affirms, and C. D. denies (*here state fully the fact or facts in issue*), and the Lord Chancellor (*or such other Court, &c.*) is desirous of ascertaining the truth by the verdict of a jury, and both parties pray that the same may be inquired of by the country. Now let a jury," &c.

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entitled to the property in certain Caen stone, which was in the hands of a third party. The issue was framed in the ordinary form of a pretended wager, instead of the form given in the second schedule to the above act. It was tried before *Maule*, J., at the London sittings during the present Term, and a verdict found in favour of the plaintiffs, with one shilling damages. It would be seen by the 8 & 9 Vict. c. 109, s. 18, that all wagers were positively prohibited, and by sect. 19, a new form of feigned issue was provided. [*Cresswell*, J.—Of what advantage will it be to arrest the judgment. Suppose the contract for 10*l.* to be void, that is of no consequence, as no one is going to enforce it. The issue is merely to try a pretended wager. Suppose it is void, then the Judge has only taken the opinion of the jury as to the property of the goods. No writ of error will lie to a judgment on proceedings on an issue under the Interpleader Act. That was decided in the Exchequer Chamber in the case of *King* v. *Simmonds and Others* (*a*). Besides, the parties have consented to this mode of proceeding.] But the provisions of the 8 & 9 Vict. c. 109, had rendered this form of issue illegal, and provided a different one. The application, therefore, perhaps ought to be to stay proceedings on the issue.

TINDAL, C. J.—This is no real wager, and, therefore, does not come within the meaning of sect. 18. Then sect. 19 merely provides, that "it shall be lawful for such Court to direct a writ of summons to be sued out," &c. The section, therefore, is merely permissive, and does not oblige the parties to adopt the form given in the second schedule, nor does it deprive the Court of its power to direct such an issue to be tried in the form previously in use. I think, therefore, there ought to be no rule.

CRESSWELL, J., COLTMAN, J., and ERLE, J., concurred.

Rule refused.

(*a*) Judgment delivered on the 9th of May, 1845; reported in 14 Law Jour. N. S. Q. B. 248.

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ROCK *v.* ADAM and Another.

KINGLAKE, Serjt., moved for leave to issue a distringas for the purpose of compelling an appearance by the defendant. The affidavit on which the application was founded stated that the writ of summons was directed to the defendant at his place of business, and that the usual calls and appointments had been made on and with a clerk there. It also stated, that on inquiries being made of the clerk where the defendant resided, he stated that his master was out of town, and that his return to London was uncertain, but that he had been in town at a time which was antecedent to the issuing of the writ. It was also sworn that three different places had been mentioned to the deponent as those of his occasional abode, but that no tidings of him could be obtained at any of them. The affidavit then stated several circumstances to induce the deponent to believe that the defendant had been in town, since the inquiries concerning him had been made. He cited *Grindley* v. *Thorn* (*a*), where the Court granted a writ of distringas to compel an appearance, although the defendant's residence could not be discovered, the usual calls and appointments having been effected at his two last known places of abode, and on an agent for the receipt of his rents, and who stated that he was in communication with his principal. In *Nugee* v. *Swinford* (*b*), where an application was made for a distringas to proceed to outlawry, the Court said, as it was apparent the defendant was in the country, the application should be to compel an appearance, and not to proceed to outlawry; and observed, that "although the defendant's residence may be unknown, yet it should be shewn that inquiries have been made in order to ascertain it." Here, such attempts had been made, and, therefore, the circumstances came within the principle

The Court granted a distringas for the purpose of proceeding to outlawry on an affidavit which disclosed attempts to serve the defendant at his place of business, and the leaving a copy of the process with a clerk, and also that the defendant's place of residence could not be discovered.

(*a*) 5 Dowl. 544.

(*b*) 9 Dowl. 1038.

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of the case cited. [*Cresswell*, J.—In *Grindley* v. *Thorn* (*a*), the Court treated the last place of abode as the defendant's continuing place of abode.]

TINDAL, C. J.—I think the affidavit states sufficient to entitle the plaintiff to a distringas for the purpose of proceeding to outlawry, but not for a distringas to compel an appearance. You may, if you think proper, take a distringas for the purpose of proceeding to outlawry.

Rule accordingly (*b*).

(*a*) 5 Dowl. 544. See *Ceal* v. *Cockburn*, 7 Scott, N. R. 413; S. C. 6 M. & G. 724.

(*b*) The rule was ~~vacated~~ up.

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1 C. & J. 2. C. B. 698.

DALRYMPLE *v.* FRASER and Another.

Two persons executed a warrant of attorney, by which they authorized certain attorneys to appear "for us and each of us," and to receive a declaration "for us and each of us in an action of debt," &c., and to confess the same action, or else to suffer judgment, &c. to pass "against us," and to be thereupon entered up "against us and each of us," and after the said judgment shall be entered up as aforesaid, "for us and in our names, and as our act and deed," to execute a release of errors. On an application to enter up judgment against one of the defendants, the Court held the warrant joint, and not joint and several, and therefore refused a rule for that purpose.

BYLES, Serjt., shewed cause against a rule nisi obtained by *Dowling*, Serjt., for leave to sign judgment against the defendant Dawes, on a warrant of attorney, in the following form: "To T. J. C. and W. H. N., attorneys of her Majesty's Court of Common Pleas at Westminster. These are to desire and authorize you, the above-named, or any one of you, or any other attorney of the Court of Common Pleas at Westminster aforesaid, to appear in the same Court for us and each of us, Hugh Fraser, of, &c., and Wm. Dawes, of, &c., and then and there to receive a declaration for us and each of us, in an action of debt for the sum of 130*l.* for money borrowed, at the suit of Elizabeth Dalrymple, and thereupon to confess the same action, or else to suffer judgment by nil dicit or otherwise, to pass against us in the same action, and to be thereupon forthwith entered up against us and each of us of record of the said Court, for the said sum of 130*l.* And we, the said Hugh

Fraser and Wm. Dawes do hereby further authorize and empower you the said attorneys, or any one of you, after the said judgment shall be entered up as aforesaid, for us, and in our names, and as our act and deed, to sign, seal, and execute a good and sufficient release in law to the said Elizabeth Dalrymple, her heirs, executors, and administrators, of all and all manner of error and errors, writ and writs of error, and all benefit and advantage thereof, and all impressions of error and errors, defects and imperfections whatever had, made, done, suffered, or to be had, made, committed, done or suffered in, about, touching or concerning the aforesaid judgment, or in, about, touching or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever, of or any way concerning the same." An application had been made at Chambers before *Erle*, J., with the same object, it being sworn that the defendant Fraser had been transported for forgery to Norfolk Island for the term of his natural life. His Lordship was however of opinion, that the warrant was joint only, but referred the parties to the Court. In pursuance of this intimation, the present rule nisi was obtained. The question for the opinion of the Court was, whether the warrant was joint, or several, as well as joint. It was submitted that it was joint only. If the words of the instrument were considered, the parties must clearly have contemplated one action only. If so, then they must be treated as having intended to give only a joint authority. The distinction between a joint and several, and a joint liability, was well laid down in the late case of *King* v. *Hoare* (*a*). *Parke*, B., in delivering the judgment of the Court there said, "the distinction between the case of a joint contract and a joint and several contract is very clear. It is argued, that each party to a joint contract is severally liable; and so he is, in one sense—that, if sued severally, and he does not plead in abatement, he is liable to pay the

(*a*) *Ante*, vol. 2, p. 389; S. C. 13 M. & W. 505.

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entire debt; but he is not severally liable, in the same sense, as he is on a joint and several bond, which instrument, though on one parchment or paper, in effect comprises the joint bond of all and several bonds of each of the obligors, and gives different remedies to the obligee." But the warrant of attorney here only spoke of "an action of debt." There was nothing to shew that the parties contemplated any more than one action. Then the question was, what was the meaning of "an action of debt," in which, judgment is to pass "against us." In *Gee* v. *Lane* (*a*), where a similar application to the present was made, the words of the warrant were "to appear for us John Lane and Wm. Gee, and to receive a declaration for us in an action of debt;" and there Lord *Ellenborough* said, "'an action to be brought against us,' must mean a joint action." This was an authority directly in point. With respect to the words "and each of us," they did not necessarily give a power to sign a several judgment, as they might be satisfied by a separate attorney appearing for each of the defendants in a joint action. He also cited *Rose* v. *Alderson* (*b*), in which it was held, that if two give a warrant of attorney to confess judgment against them, and one dies, judgment cannot be entered up against the other.

Dowling, Serjt., in support of the rule. No doubt, if the warrant of attorney was clearly joint only, a several judgment could not be signed in pursuance of it. But the question was, whether the present warrant must not be construed both as joint and several; the words "and each of us" could not be discarded as surplusage, and if not, then a reasonable meaning must be attributed to them. The only reasonable meaning which could be attributed to them was to render the warrant of attorney several as well as joint. The construction sought to be put upon those words by the other side was unreasonable, because the language of the

(*a*) 15 East, 592. (*b*) 7 Taunt. 453; S. C. 1 Moore, 145.

warrant shewed that a separate declaration and a separate judgment were contemplated. If in order to satisfy those words "and each of us," the course suggested on the other side were adopted, the effect would be that there might be separate appearances, separate declarations, and then there must be a joint judgment. It could not be supposed that the parties intended so unreasonable a mode of proceeding. The fair presumption was, that the parties intended the warrant to be several as well as joint. If so, then were the other words of the instrument inconsistent with such a construction? They were not, because the expression "an action" might well mean an action against each, it being only necessary to construe it distributively. By adopting this mode of construction, all the words of the instrument were rendered operative, and a reasonable meaning given to them; whereas by adopting the other, some of the words must be discarded, and inconvenient consequences would result. With respect to the case of *Gee* v. *Lane*, it was not in point, because the language of the warrant there rendered the instrument clearly joint. The same observation was applicable to the case of *Raw* v. *Alderson*. With respect to the meaning of the word "each," it clearly implied severally, and had so been construed in wills as in the case of *Kew* v. *Rouse* (*a*); and the word "and" might, in order to effectuate the intention of the parties, be construed as "or." Thus in *Swift* d. *Huntley* v. *Gregson* (*b*), where a power was given to appoint real estate "to the use of such child *and* children," an exclusive appointment to one was held good. There *Ashurst*, J., said, "it appears to me that the true construction of this settlement is, that the father should have a discretionary power to appoint 'to any child *or* children.'" Whether, therefore, the instrument was construed according to the language of it as it stood, or the word "and" was construed "or," the meaning of the parties

(*a*) 1 Vern. 353.

(*b*) 1 T. R 432.

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must fairly be presumed to be that the instrument should be both several and joint.

TINDAL, C. J.—The question is, what is the predominant intention of the parties as expressed in this instrument? Now, in the beginning, they authorize the attorneys to appear in the Court of Common Pleas "for us and each of us," and then and there to receive a declaration "for us and each of us;" and if it stopped there, it might be doubtful whether a joint or several action were contemplated; but then it goes on to say, "in an action of debt," and subsequently proceeds, and "thereupon to confess the same action, or else to suffer judgment by nil dicit, or otherwise, to pass against us in the same action." That clearly contemplated only one action and one judgment. This construction is confirmed by the subsequent clause, which provides, "after the said judgment shall be entered up as aforesaid, for us and in our names to execute a release of errors, touching or concerning the aforesaid judgment." Looking at these expressions, it appears to me that judgment was intended, and that judgment should be, against both.

MAULE, J.—I am of the same opinion.

CRESSWELL, J.—I think the language of the warrant of attorney contemplates a joint, and excludes a several judgment.

ERLE, J., concurred.

Rule discharged.

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1C 2CB. 861

ERROR on a judgment of the Court of the manor of Taunton Dean, Somersetshire. To the writ of false judgment issued in this case, the sheriff made a return under the seals of himself and Wm. Kinglake, the steward, and four free suitors of the said manor, lawful men of the said Court, and the record set forth in the schedule to the writ was as follows:—

"Taunton Dean, Somersetshire, to wit. The Court Baron of Robert Mattock, Esq., Lord of the Manor of Taunton Dean, in the City of Somerset, held on the 8th day of November, A. D. 1843, at the Castle Hall, in and for the said Manor, and within the jurisdiction of the said Court, according to the custom of the said Court and of the said Manor, from time whereof the memory of man runneth not to the contrary, there used and approved of in the said Court and Manor, before William Kinglake, Esq., the steward of the said Court, a free suitor thereof, and William Upham, and William Hurdley Mulford, and others, free suitors of the said Court. Be it remembered that at this Court comes here James Gill, in his proper person, and now here in the same Court levies his plaint against John Brown, in the plea of 39*s.* 11*d.* in the same Court, and he finds pledges for prosecuting his said plaint, to wit, John Doe and Richard Roe; and now, in the same Court here, prays process of the same Court here, to be made to him thereon, against the said John Brown, in the plea of the said plaint, and it is granted to him," &c. It then proceeded to state the summons and appearance of the defendant, and various subsequent proceedings in the cause continued by imparlance, and all described as taking place at Courts "Held at the Castle Hall aforesaid, in and for the said Manor, and within the jurisdiction of the said Court, on, &c., before William Kinglake, Esq., Steward of the said Court, William Upham, and William

On a return to a writ of false judgment of the proceedings in a Court baron to recover a debt, the Court was stated to have been held before W. K. Esq., steward of the said Court, and W. U. and W. M. and others, free suitors of the said Court: *Held*, that it was not necessary for the proceedings to shew that the steward was also steward of the manor: *Held* also, that the above was the correct style of the Court, and that it was not a necessary presumption that the steward acted judicially in the proceedings: *Held*, that it was not necessary to state the names of more than two of the suitors.

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Hurdley Mulford, and others, free suitors of the same Court." It then proceeded to state the award of jury process to try the issues joined between the parties at the ensuing Court. The return then proceeded—"And at which said Court, held at the place aforesaid, in and for the Manor aforesaid, and within the jurisdiction of the said Court, on the 13th day of October, 1844, before the said William Kinglake, Esq., Steward of the said Court, and William Upham and George Mathews, free suitors of the said Court, came, as well the said James Gill as the said John Brown, by their attorneys aforesaid." Then followed the statement of the trial, the verdict and damages in favour of the plaintiff, and concluded—"And hereupon the said James Gill prays the judgment of the Court hereof; and upon the premises aforesaid, it is considered by the said Court here, that the said James Gill do recover against the said John Brown, the said debt of 39*s.* 11*d.*, and his damages, costs, and charges aforesaid, by the jurors aforesaid, in form aforesaid, assessed, and also 10*l.* for his costs and charges by him about his suit in that behalf expended, by the Court here adjudged of increase to the said James Gill, and with his assent, which said debt, damages, and costs, amount in the whole to 11*l.* 19*s.* 11*d.*" Errors having been assigned,

Kinglake, Serjt., appeared for the plaintiff in error. The first error assigned was, that in the proceedings in the Court below, it appeared that they took place before Mr. Kinglake, steward of the Court, he not necessarily being a free suitor; none however but free suitors and the steward of the manor had a right to be present. No doubt, at the commencement of the return, it appeared that Mr. Kinglake was a free suitor, and therefore would have a right to be present, but he was not subsequently described in that character. It must therefore be presumed, that he had ceased to be a free suitor. In the character of steward of the Court, he would have no right to be present and act

judicially, as it appeared he had acted in the present case; for the law would not recognise a person acting in the mere ministerial character of steward of the Court as a competent officer to hold the Court. As steward he would have no right whatever to join in the exercise of the judicial functions of the suitors. The case was different from that of the Lord's Court, in which he alone presided; but which Court had no jurisdiction in plaints for debt. [*Tindal*, C. J.—He having been described at the commencement of the proceedings as a free suitor, would not his interest be presumed to continue?] That would not be so in the case of an inferior Court like the present, where no presumption could be raised in favour of the jurisdiction. Each step in the proceedings ought to disclose sufficient to shew that the cause of action was within the jurisdiction of the Court. As the record now stood, it appeared, that judgment had been pronounced by the free suitors in conjunction with a person who had no authority to join in that judgment. The case then came within the principle of *Jones* v. *Jones* (*a*), where it was decided that a declaration on the judgment of a county Court alleging it to have been held before the "sheriff and the suitors" was bad on special demurrer. There, Lord *Abinger* said, "The declaration alleges that at a certain county Court, 'before the sheriff and suitors,' the plaintiff recovered, &c. If any meaning be given to the word 'before' it implies that the sheriff sat there as a Judge, but he has no authority to concur in the judgment. Suppose the suitors differed, the sheriff might have given it against the suitors. That he could not do by law." Lord *Abinger* also observed (*b*), "Suppose a judgment recovered before the Court of Common Pleas were pleaded as a judgment recovered 'before the justices of our lady the Queen of the Bench, and the Lord High Chancellor,' it

(*a*) 7 Dowl. 841; S. C. 5 M. & W. 523.
(*b*) 5 M. & W. 527.

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would be error, and the latter part of the allegation could not be rejected as surplusage." That case was precisely analogous to the present, for the steward filled the same office in the Court Baron that the sheriff did in the county Court. In *Bro. Abr.* tit. "*Court Baron*," pl. 11, it was laid down, "nota *per Choke*, J., that in Court Baron, county, or hundred, the suitors are judges, and the bailiff and sheriff are only ministers." In *Holroyd* v. *Breare and Another* (*a*), it was held, that an action for trespass would not lie against the steward of a Court Baron where his bailiff, by mistake, took the goods of a wrong person; and in *Tunno* v. *Morris* (*b*), it was held that the sheriff is a constituent part of the county Court, and acts in that character in issuing process of execution, and is not liable for the wrongful act of the bailiff, done in the execution of such process. The case of *Tinsley* v. *Nassau* (*c*) was to the same effect. [*Tindal*, C. J.—The style of the county Court is wholly different from that of the Court Baron. *Cresswell*, J.—The style of the Court in 4th *Instit.* 268, is the same as in the present case: that is a strong authority against you. *Coltman*, J.—In *Jones* v. *Jones*, *Parke*, B., rested his judgment on the ground that the style of the county Court was wholly different from the one adopted in that case. *Erle*, J.—Is there any one instance in which the Court Baron is not described as in the present case?] Another objection was, that it appeared in the record that the plaintiff had levied his plaint for 39*s.* 11*d.*, but not for what cause. It did not therefore appear that it was a matter within the jurisdiction of the Court. If it was not, the subsequent declaration could not give jurisdiction. [*Tindal*, C. J.—The declaration states the demand to be a debt, and removes the uncertainty of the process. *Cresswell*, J.—If the plaint did not mention the subject-matter of the demand, but the declaration dis-

(*a*) 2 B. & A. 473.
(*b*) 4 Dowl. 224; S. C. 2 C., M. & R. 298.
(*c*) M. & Mal. 52; S. C. 2 C. & P. 582.

closed a cause of action within the jurisdiction of the Court and the defendant appeared, the objection would be cured.] Lastly, the judgment was incorrect, in not stating the names of the other free suitors, besides those which were mentioned. In *Lewis* v. *Weeks* (*a*), in an action of debt on the judgment of an inferior Court, the plaintiff declared that at a certain Court, "Coram sectatoribus," without naming them, and the declaration was held ill, though cured by verdict; and in *The King* v. *Mein* (*b*), in a quo warranto information, where the defendant relied on an election by a homage consisting of twenty-three free tenants; the jury found on a special verdict that twenty-one of those tenants were not free tenants, and the Court held the election void. On these grounds the plaintiff in error was entitled to judgment.

Channell, Serjt. For the defendant in error, received an intimation from the Court to direct his argument to the second and last points. With respect to the case of *Jones* v. *Jones*, it could not be considered as an authority in the present instance, and the ground on which it was decided was that the whole style and title of the Court had not been adopted. The case was a decision on special demurrer, according to the 4th *Institute*, chap. 55, p. 266. Lord *Coke* stated the style of the Court to be "curia prima comitatus E. C. militis vicecomitis com' prædict' tent' apud B.," &c. And the next Court "curia secunda E. C. vicecom' com' prædict' &c." And in giving the style of the Court Baron, in chap. 57, p. 268, it was described as "Curia baronis E. C. militis manerii sui prædicti tent' tali die., &c. Coram A. B. seneschallo ibidem." In chap. 56, which referred to the Court of the hundred, it was stated, "This is no Court of record, and the suitors be thereof judges." But in stating the style of the Court, it was described to be "Curia E. C. militis hundredi sui de B. in

(*a*) Carthew. 85.

(*b*) 4 T. R. 480.

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com' Buck. tent', &c. Coram A. B. seneschallo ibidem." So in *Bac. Ab.* tit. "*Of the Hundred Court*," an objection was taken that the plea was laid to be "coram seneschallo et sectatoribus," instead of being laid as held "coram seneschallo per sectatores," and *Wyndham*, J., *Athins*, J., and *Scroggs*, J. thought it well enough. These were authorities to shew that the form adopted in the present case was correct. With regard to *Holroyd* v. *Breare* (*a*), and *Tunno* v. *Morris* (*b*), cited on the other side, they ought rather to be considered as authorities in favour of the defendant in error; for they tended to shew that the steward formed a part of the Court, and was not a mere officer of it. Then as to the last objection, that the names of all the suitors were not introduced into the record. No authority could be shewn to prove that it was necessary to state the names of all the suitors. It was only requisite to state the names of two of the suitors, and the reason for such a practice was, that it might appear that the trial had taken place before the "peers," and not the "peer" of the parties. Here, the names of more than two of the suitors were stated. The record was therefore, on this point, unobjectionable. The case of *The King* v. *Mein* (*c*) had been cited on this point, but it could in no way be considered as applicable, because it was there found by the jury, that several of the suitors had been excluded from the proceeding, and a very considerable majority who had acted were not duly qualified. It was on this peculiar state of facts that the decision of the Court proceeded.

Kinglake, Serjt., was heard in reply.

TINDAL, C. J.—I think that the judgment of the inferior Court ought to be affirmed. Four objections have been made to its proceedings: the first of which is, that the

(*a*) 2 B. & A. 473.
(*b*) 4 Dowl. 224; S. C. 2 C., M. & R. 298.
(*c*) 4 T. R. 480.

person was not competent to hold the office of steward of the Court, unless he was also steward of the manor, and that he is not so described in any part of the record; but I cannot find any authority for the position, that the steward of the Court must necessarily be steward of the manor. In *Com. Dig.* tit. "*Copyhold*," R. 8, it is said, citing *Kitchen*, 6, 53, that "the style of the Court contains the time and place, and before what steward, it is held;" and in R. 5, that "the steward may be retained by deed or by parol," and that "a retainer by parol may be for a Court leet as well as for a Court baron." For that position *Co. Litt*, 61, b, is cited. Now nothing is said there respecting the steward of the manor being the steward of the Court; and it is a matter of frequent and constant experience, that a person is appointed to hold the Court who is not made steward of the manor. It is, however, then said, that this appears on the proceedings to have been a Court held before improper Judges. The Court is stated to have been held "before the said William Kinglake, Esq. steward of the said Court, and William Upham, and George Mathews, and others, free suitors of the said Court." If that be an incorrect style of the Court, the proceedings are irregular. It is said, that not only must we understand from this description, that Mr. Kinglake was present at the Court, but that he was a Judge of it. But this is the usual style of the Court, and I think we should interpret the language wrongly, if we held that hence it is to be inferred that the steward acted in the capacity of a Judge. The steward has a known, definite duty to perform, viz., to collect and declare the suffrages of the suitors; so the suitors have a known and definite duty, which is to judge. The case of *Jones* v. *Jones* (*a*), which has been cited, related to the county Court; but the style of the two Courts is different. The style of the county Court is, "Essex, to wit, the first county Court of A. B.,

(*a*) 7 Dowl. 841; S. C. 5 M. & W. 523.

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sheriff of the said county, held at D., &c." *Com. Dig.* tit. "*County*," (C. 1.) It is not stated before whom it isheld; and it might be wrong to say that it was held before the sheriff, as there laid down. But that case arose on special demurrer, which is not the case here; and in 21 *Hen.* 6, p. 34, which is no mean authority, it seems to have been considered sufficient to describe the county Court as held before the sheriff. The third objection only goes to the formality of the plaint. It was a simple irregularity, and if the defendant chose to appear and plead, I think the time has gone by for his insisting on that objection. With reference to one observation, which has been made on this point, that the Court will make no intendment in favour of the proceedings of this inferior Court, it may be well to remark, that where the matter appears to be within its jurisdiction, intendment ought to be made in favour of their regularity. As to the last point, no authority has been produced before us to shew that it is necessary to state the names of all the suitors. The reason why you must shew that there are two freeholders, is because there can be no Court unless there be two suitors. In *Chetwode* v. *Crew* (*a*), it was held too, that there must be two old freehold tenants of the manor, and that they could not be created at this day, and for want of two such tenants, the Court was considered to be lost. There seems to me no reason why the record should go on to state the names of more than those two when we might, by requiring it, create mistake and confusion. Persons might go out, and not be present at the particular moment, though they were at the Court originally, which might lead to inconvenience. It seems to me, therefore, that none of the objections are well founded.

COLTMAN, J.—I am of the same opinion. The first objection seems to me to rest on no solid foundation. The

(*a*) Willes, 614.

passage from *Co. Litt.*, which has been referred to, shews that it is not incorrect to describe the person as steward of the Court, and that he need not be steward of the manor. With respect to the second objection, which derived some colour from *Jones* v. *Jones* (*a*), it is to be observed, that it is not to be decided upon that case. There, the question arose upon a special demurrer, which was founded on the circumstance, that the proper title of the Court had not been set forth. It is, consequently, not a decision directly in point; but the case from *Bac. Abr.* tit. "*Of the Hundred Court*," seems to me a far better authority, where it is said, "In an hundred Court the plea was said to be 'coram seneschallo et sectatoribus.' Serjeant *Newdigate* took an exception to it, that it should be laid to be held, 'coram seneschallo per sectatores;' but *Windham*, *Athins*, and *Scroggs* thought it well enough." The Court, therefore, were of opinion, in that case, that the style here used was right. As to the fourth point, no authority can be produced to support it. The proceeding set forth the names of two freeholders, and that appears to me to be every thing that is essential.

CRESSWELL, J.—I have nothing to add on the first and second points: and as to the third, I believe it is not usual in such cases to make more than this entry. That seems to be recognized in *Bishop* v. *Kaye* (*b*), where it was held, that it was no ground of error in an inferior Court, that the plaint was levied before the cause of action accrued. In that case nothing more is said, than that Kaye levied a certain plaint against Bishop, whereupon a summons issued, and the plaintiff ultimately declared for money lent. That was every thing that appeared upon the record; at all events, the omission was but an irregularity which the party has remedied by appearing and pleading. Then, with respect

(*a*) 7 Dowl. 841; S. C. 5 M. & W. 523.
(*b*) 3 B. & A. 605.

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to the mention of the names of the suitors, all the argument was founded upon the case of *The King* v. *Mein*(*a*). That was a quo warranto for holding an office of port reeve, to which the party pleaded that he was duly elected to it by the homage of the free tenants of the borough and manor duly charged and sworn, to wit, J. Mein, P. Tonkin, and others. The replication, after taking issue on the several parts of the defendant's plea, mentioned the names of the twenty-one other persons, besides the two who were specially mentioned, and stated that they were not free tenants. There, the jury found that those twenty-one persons were not free tenants; and, moreover, that several free tenants were excluded. *Ashurst*, J., there says, "Where a defendant makes it a part of his title that a Court, at which he was elected, was held before twenty-three homagers, he cannot afterwards rely on this, that two of them were of that description." There the defendant stated, that the homage consisted entirely of the free tenants; but the jury negatived the fact.

ERLE, J. concurred.

Judgment affirmed.

(*a*) 4 T. R. 480.

REGULÆ GENERALES.

EXAMINATION AND ADMISSION OF ATTORNEYS.

Jame 2. Ch. 790

Easter Term, 1846.

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WHEREAS by section 15 of the statute 6 & 7 Vict. c. 73, it was enacted, "That it shall be lawful for the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, or any one or more of them, and he and they is and are hereby authorized and required before he or they shall issue a fiat for the admission of any person to be an attorney, to examine and inquire, by such ways and means as he or they shall think proper, touching the articles and service, and the fitness and capacity, of such person to act as an attorney; and if the Judge or Judges as aforesaid shall be satisfied by such examination, or by the certificate of such examiners as hereinafter mentioned, that such person is duly qualified, and fit and competent to act as an attorney, then, and not otherwise, the said Judge or Judges shall, and he and they is and are hereby authorized and required to administer, or cause to be administered, to such person the oath hereinafter directed to be taken by attorneys and solicitors, in addition to the oath of allegiance, and after such oaths taken to cause him to be admitted an attorney of such Court;" and by section 16 of the said statute, it was enacted "For the purpose of facilitating the inquiry touching the due service under articles as aforesaid, and the fitness and capacity of any person to act as an attorney, that it shall be lawful for the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, (or any eight or more of them, of whom the chiefs of the said Courts shall be three), from time to time to nominate and appoint such persons to be examiners for the purposes aforesaid, and to make such rules and regulations for con-

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ducting such examination as such Judges shall think proper:" And whereas, in order to carry the said statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the Judges in manner hereafter mentioned:—

1. IT IS ORDERED, that the several Masters for the time being for the Courts of Queen's Bench, Common Pleas, and Exchequer, respectively, together with sixteen attorneys or solicitors, be appointed by rule of Court in every year to be examiners for one year, any five of whom (one whereof to be one of the said Masters) shall be competent to conduct the examination; and that subject to such appeal as hereinafter mentioned, no person who shall not have been previously admitted a solicitor of the High Court of Chancery shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such examiners actually present at and conducting his examination testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the Term next but one following the date thereof, unless such time shall be specially extended by the order of a Judge.

2. It is further ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the Judges.

3. And it is further ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the clerk of the Lord Chief Justice of the Court of Queen's Bench, upon which no fee or gratuity shall be received, which application shall be heard in Serjeants' Inn Hall by not less than three of the Judges.

4. And whereas the hall or building of the incorporated Law Society of the United Kingdom, in Chancery Lane, will be a fit and convenient place for holding the said examinations, and the said Society have consented to allow the same to be used for that purpose: it is further

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ordered that until further order, such examinations be there held on such days as the said examiners, or any five of them, shall appoint; and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a Term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said Society at their said Hall; which notice shall also state his place or places of residence or service for the last preceding twelve months; and in case of application to be admitted on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

5. And it is further ordered, that three days at the least before the commencement of the Term next preceding that in which any person not before admitted shall propose to be admitted an attorney to either of the Courts, he shall cause to be delivered at the Master's office, instead of affixing the same on the walls of the Courts, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months; and the Master shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables, under convenient heads, and affix the same on the first day of Term, in some conspicuous place within or near to and on the outside of each Court. And such person shall also for the space of one full Term previous to the Term in which he shall apply to be admitted, enter or cause to be entered in two books kept for that purpose, one at the Chambers of the Lord Chief Justice or Chief Baron of the Court in which he applies to be admitted, and the other at the Chambers of the other Judges or Barons of such Court, his name and place or places of abode, and also the name or names, and place or places of abode of the attorney or attorneys to whom he shall have been articled.

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6. And it is further ordered, that a printed copy of the list of admissions be stuck up in the Queen's Bench, Common Pleas, and Exchequer offices, and at the Judges' Hall or Chambers of each Court in Rolls Gardens.

(Signed by all the Judges, except Maule, J., and Coleridge, J.)

REGULATIONS.

APPROVED BY THE JUDGES IN EASTER TERM, 1846, FOR THE EXAMINATION OF PERSONS APPLYING TO BE ADMITTED AS ATTORNEYS OF THE COURTS OF QUEEN'S BENCH, COMMON PLEAS, OR EXCHEQUER, PURSUANT TO THE RULE OF COURT MADE IN EASTER TERM, 1846.

WHEREAS by a Rule of the Courts of Queen's Bench, Common Pleas, and Exchequer, made in Easter Term, 1846, it was ordered, that the several Masters for the time being of the said Courts respectively, together with sixteen attorneys or solicitors, should be appointed by a rule of Court in every year to be examiners for one year of persons applying to be admitted attorneys of the said Courts, any five of whom, (one whereof to be one of the said Masters,) should be competent to conduct the examination, and that, subject to such appeal as therein-after mentioned, no person not previously admitted a solicitor of the High Court of Chancery should be admitted to be sworn an attorney of any of the said Courts, except on production of a certificate signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the Term next but one following the date thereof, unless such time should be specially extended by the order of a Judge: And it was further ordered, that the examiners so to be appointed should conduct the said examinations under regulations to be first submitted to and approved by the Judges; and that until further order such examinations

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should be held in the hall or building of the incorporated Law Society of the United Kingdom in Chancery Lane, on such days as the said examiners, or any five of them, should appoint, and that any person not previously admitted of any of the three Courts, and desirous of being admitted, should give a Term's notice of his intention to apply for examination, by leaving the same with the secretary of the said society at their said hall.

In pursuance of the said rule the following regulations for conducting the said examinations have been submitted to and approved by the Judges of the said Courts.

1. That every person applying to be admitted an attorney of any of the said Courts pursuant to the said rules shall, within the first seven days of the Term of which he is desirous of being admitted, leave, or cause to be left with the secretary of the said Incorporated Law Society his articles of clerkship duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant and also by the attorney or attorneys with whom he shall have served his clerkship.

2. That in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

3. That every person applying for admission shall also, if required, sign and leave, or cause to be left with the secretary of the said society, answers in writing to such other written or printed questions as shall be proposed by the said examiners, touching his said service and conduct, and shall also, if required, attend the said examiners personally, for the purpose of giving further explanation touching the same, and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid to answer either personally or in

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writing any questions touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

4. That every person so applying shall also attend the said examiners at the hall of the said society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him by written or printed paper touching his fitness and capacity to act as an attorney.

5. That upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination, (one of them being one of the said Masters,) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same under their hands in the following form, viz. :—

In pursuance of the rules made in Easter Term, 1846, of the Courts of Queen's Bench, Common Pleas, and Exchequer, we being the major part of the examiners actually present at and conducting the examination of A. B., of &c., do hereby certify that we have examined the said A. B. as required by the said rules: And we do testify that the said A. B. is fit and capable to act as an attorney of the said Courts.

QUESTIONS AS TO DUE SERVICE OF ARTICLES OF CLERKSHIP.

TO BE ANSWERED BY THE CLERK.

1. What was your age at the date of your articles?

2. Have you served the whole term of your articles at the office where the attorney or attorneys to whom you were articled or assigned carried on his or their business? and if not, state the reason.

3. Have you at any time during the term of your articles been absent without the permission of the attorney or attorneys to whom you were articled or assigned? and if so, state the length and occasions of such absence.

4. Have you during the period of your articles been engaged or concerned in any profession, business, or employment, other than

your professional employment as clerk to the attorney or attorneys to whom you were articled or assigned?

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5. Have you since the expiration of your articles been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

Questions to be answered by the Attorney, Agent, Barrister or Special Pleader, with whom you may have served any part of your time under your articles.

1. Has A. B. served the whole term of his articles at the office where you carry on your business? and if not, state the reason.

2. Has the said A. B. at any time during the term of his articles been absent without your permission? and if so, state the length and occasions of such absence.

3. Has the said A. B., during the period of his articles been engaged or concerned in any profession, business, or employment other than his professional employment as your articled clerk?

4. Has the said A. B. during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5. Has the said A. B. since the expiration of his articles been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

And I do hereby certify that the said A. B. hath duly and faithfully served under his articles of clerkship (or assignment as the case may be) bearing date, &c. for the term therein expressed, and that he is a fit and proper person to be admitted an attorney.

(Signed by all the Judges, except Maule, J., Coleridge, J., Platt, B., and Erle, J.)

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RENEWAL OF ATTORNEYS' CERTIFICATES.

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4 D & L 641.

WHEREAS by sect. 25, of the stat. 6 & 7 Vict. c. 73, it was enacted, that if any attorney shall neglect to procure an annual stamped certificate, authorizing him to practise as such within the time by law appointed for that purpose, then and in such case the registrar of attorneys and solicitors shall not afterwards grant a certificate to such attorney without the order of one of the Courts of Queen's

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Bench, Common Pleas, or Exchequer, or of one of the Judges thereof, to issue such certificate:

And whereas it is expedient that upon the application of an attorney having neglected for the space of one whole year to procure or to renew an annual stamped certificate, the Judges should have means of inquiring as to the circumstances under which he has omitted to commence or has discontinued to practise, and as to his conduct and employment during the term of such omission or discontinuance:—

See 5 Dowl. 60 — " — 294

IT IS ORDERED, that from and after the last day of Trinity Term next, every person who shall intend to apply on the last day of Term or in Vacation for such order shall three days at the least previous to the first day of the Term, on the last day of which application is intended to be made, or in case the application is to be made in the Vacation, shall previous to the first day of the preceding Term, leave at the office of the Masters of the Court in which he intends to make the application a notice in writing, containing his name and place of abode for the last preceding twelve months. And that before the said first day of Term he shall enter or cause to be entered a like notice in two books kept for that purpose, one at the Chambers of the Lord Chief Justice or Chief Baron, and the other at the Chambers of the other Judges or Barons, and shall before the said first day of Term cause to be filed the affidavit upon which he seeks to obtain or renew his said certificate at the office of the Masters aforesaid, and a copy thereof to be also left at the Chambers of the Lord Chief Justice of the Court of Queen's Bench.

And it is further ordered, that the Masters reduce such notices into alphabetical order, and add the same to the list of admissions, and the order for the granting the certificate shall be drawn up on reading such affidavit of such copy having been left in compliance with this rule.

(Signed by all the Judges, except Maule, J., and Coleridge, J.)

AN

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1. An affidavit sworn in London, described the party making it as the "agent for the defendant in this cause:" *Held* sufficient. *Matthewson and Another* v. *Balstow*, 327

2. The jurat of an affidavit purported to be "sworn in Court this 9th day of November, 1845:" *Semble*, that as the 9th of November, 1845, was a Sunday, the jurat was defective. *Doe* d. *Williamson and Another* v. *Roe*, 328

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2. On a reference to arbitrators, with power to appoint an umpire to decide between them, in case they should differ in opinion; the arbitrators appointed an umpire; but no difference arising between them, the umpire was not consulted. In the award, the arbitrators recited that they had "considered the decision of the umpire:" *Held*, that this recital was mere surplusage. *Harlow* v. *Read*, 203

3. Where a cause was referred by Judge's order, and the arbitrator directed a verdict to be entered for the plaintiff, the order giving him no power so to do, the Court refused to set aside the award on motion.

In such a case, the Court will not enforce the award by attachment, but will leave the party to his remedy by action. *Cock* v. *Gent and Others*, 271

4. Assumpsit. The declaration contained counts for goods sold and delivered, for money had and received, and for money due on an account stated. The defendant pleaded, 1. Except, &c., non assumpsit. 2. As to the sum excepted, tender. 3. Except, &c., set-off. 4. Except, &c., payment. On these pleas issue was joined. At the trial, a verdict was taken by consent for the plaintiff, subject to the certificate of an arbitrator, who made his certificate in the following terms: As to the issues *firstly*, thirdly, and lastly joined between the parties in the said cause, I do find and certify that the verdict so found as aforesaid ought to stand, and that the same shall and do stand upon and so far as the same relates to the said first, third, and last issues:" *Held*, on motion to set aside the above certificate, that the "issue *firstly* joined" meant the issue of non assumpsit to the whole declaration; and that it was not necessary to find seperately on the issue of non assumpsit as to each count. *Adam* v. *Rowe*, 331

5. An action on an apprentice deed was referred to arbitration by order of nisi prius, together with two other actions, in one of which the infant apprentice sued by his next friend, the costs of the causes to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator awarded that the verdict in the above cause should be entered for the defendant, that the two other actions should be no further prosecuted, and that the infant should pay the costs of the reference and award. *Held*, that the award was not bad by reason of its directing an infant to pay costs. *Proudfoot* v. *Poile*, 524

6. Action on the case. The first count was for selling manure, falsely and fraudulently representing it to be guano; alleging as special damage not only the injury to plaintiff's own lands and crops, but that he had been obliged to pay to several parties named, to whom he had resold it, compensation for the injury caused to their lands and crops. There was a second count similar to the first, upon another sale of another parcel of the manure. Before plea pleaded, a Judge's order was obtained, referring "all matters in difference between the parties in the cause" to an arbitrator; the costs of the action to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. It appeared that at the inquiry before the arbitrator a witness who had purchased or used some of the guano, was tendered on behalf of the plaintiff, to prove the special damage alleged in the declaration, but was objected to on the ground that he was not named

in the declaration, and that his evidence was accordingly not received. The arbitrator, by his award, which was not expressed to be de præmissis, ordered the defendant to pay to the plaintiff a certain sum of money, and that the costs of the reference and award should be paid by the defendant: *Held*, that the award was bad, for not shewing whether the money was to be paid in respect of the action, or of any other matter in difference between the parties. *Crosbie* v. *Holmes*, 566

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8. Where a verdict is taken at nisi prius by consent, subject to the certificate of an arbitrator, the certificate, when given, relates back to the time of the verdict; therefore where such certificate was given in Vacation, and several months after the return day of the distringas: *Held*, that the successful party might sign judgment immediately, and was not bound to wait until after the first four days of the ensuing Term. *Cremer* v. *Chuck*, 672

9. On a motion to set aside an award, the Court will not look at the notes of the arbitrator. *Doe* d. *Haxby* v. *Preston*, 768

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2. A rule nisi for an attachment for non-payment of costs having been refused, on account of defective service: *Held*, that the application might be renewed after a fresh demand and due service. *Dixon* v. *Oliphant*, 485

3. A demand of costs, pursuant to a Master's allocatur, indorsed on the consent rule, was held sufficient for an attachment; where the affidavit stated that the deponent had served the defendant with a copy of the original rule and allocatur, at the same time shewing him the original rule and allocatur, and had "then demanded of him the costs allowed by the Master upon the said rule;" although it did not appear that any sum was named. *Doe* d. *Tew* v. *Billingham*, 769

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1. Where an attorney encloses an unsigned bill of costs in a letter signed by him, and the bill of costs does not on the face of it shew who is the party chargeable therewith, the letter may be referred to supply that defect. *Taylor* v. *Hodgson*, 115

2. It is not necessary that an attorney's bill should be entitled in a cause or Court, if from the bill taken altogether it can be reasonably ascertained in what Court and cause the business has been transacted. *Martindale* v. *Falkner*, 600

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When a party had given regular notices of his intention to apply to be admitted as an attorney on the first day of Hilary Term, and it appeared that on the second day of Michaelmas Term an offer of partnership from the London agents of the firm to which he was articled had been made, provided he could get admitted by the last day of that Term; the Court on motion, on the fourth day of Michaelmas Term, ordered that on his giving fresh notices referring to the former notices and the present rule, he should be examined, and if of ability, admitted the last day of that Term. *Ex parte Cunliffe*, 348

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1. Where an attorney arranged terms for the settlement of an action, and in pursuance thereof drew up a promissory note for the amount of the debt and costs, which the defendant signed; and also gave his own undertaking to guarantee the payment of the note with interest: *Held*, that this was an undertaking given in his character of attorney; although he was not the attorney in the action, and it was sworn by him that he was not acting as attorney for the defendant, and that he had not made any charge, or been paid anything for his services. *In Re Thomas Fairthorne, Gent., one, &c.* 548

2. It is no objection to a rule calling on an attorney to pay a sum of money pursuant to his undertaking, that nearly three years have elapsed since it was given; repeated applications for payment having been made from time to time up to a recent period. *Titterton* v. *Sheppard*, 775

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An attorney who has received a promissory note on account of costs, may bring an action on the note; although he has not delivered a signed bill: and it is no objection that the note includes future costs. *Jeffreys* v. *Evans and Others*, 52

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A rule calling on a party to pay money pursuant to an award, with a view to execution under the 1 & 2 Vict. c. 110, is a rule nisi only; and the Court refused to make such rule absolute, without personal service, where it appeared that such service might be effected. *Winwood* v. *Holt*, 85

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Where the sessions had refused, on the application of the guardians, to make an order of affiliation under the 2 & 3 Vict. c. 85: *Held*, that they were nevertheless bound to entertain the complaint of the mother under the 7 & 8 Vict. c. 101, if made within the time limited by that act. *Regina* v. *Walker and Others, Esquires*, 131

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1. A local act, the 6 & 7 Vict. c. 76, empowered certain commissioners to make an assessment for the purposes mentioned in the act. The act contained several clauses relating to proceedings before magistrates to enforce the payment of the assessment; and, by a subsequent clause, the 158th provided "that no proceeding in pursuance of this act, &c. shall be quashed or vacated for want of form, nor shall the same be removed by certiorari or otherwise, into any of the superior Courts." The power to appeal to the quarter sessions was given by the 161st section: *Held*, that the clause taking away the certiorari had a general application to all proceedings under the act; and, therefore, applied to the case of an appeal under the 161st section. *Reg.* v. *The Justices of Lindsey*, 101

2. The 3 Vict. c. 10, enacts, that in orders of bastardy it shall be suffi-

cient to follow the forms given in the schedule to the act. Form No. 8, in the schedule has a blank left after the words and we having "heard the evidence of such woman:" *Held* on motion for a certiorari to bring up an order in bastardy, for the purpose of being quashed, as not shewing that the evidence of the woman was taken on oath, that it was not necessary that such blank should be filled up with the words "on oath" or "on affirmation." *Regina* v. *The Justices of Cheshire*, 337

3. Where an order of removal is apparently defective on the face of it, as not shewing jurisdiction on the part of the justices making it; the parish on whom the order is made, need not appeal to the Court of Quarter Sessions, but may come in the first instance to this Court for a certiorari. *Regina* v. *G. W. Blathwayt and Henry Bush, Esqrs.* 542

CHURCHWARDEN.

See NOTICE OF APPEAL, 3, 4.

COMPOUNDING CRIME.

See WARRANT OF ATTORNEY, 3.

COMMISSION.

See CROWN, 1.
FEME COVERT, 1.

COMMISSIONER.

See INTERROGATORIES.
INQUISITION.

CONSENT.

See DECLARATION, 4.

CONSIDERATION.

See PLEA, 13.

CONSUL.

See AFFIDAVIT, 3.

CONTINUANCE (OF WRIT).

See WRIT (CONTINUANCE OF).

COSTS.

See ARBITRATION, 5.
COURT OF REQUESTS.
NEW TRIAL, 3.
PAUPER, 1, 2.
PLEA, 12.
SHERIFF, 5.
STAYING PROCEEDINGS, 3.

1. A party who successfully shews cause in the first instance, is entitled to costs in cases where a rule nisi would, if granted, have operated to his prejudice. *Rennie and Another* v. *Beresford and Others*, 464

2. Where, after writ issued, the defendant applies to a Judge to stay proceedings on payment of a certain sum and costs, and the plaintiff refuses to accept the sum offered, alleging that more is due, but at the trial recovers no more; he is entitled to full costs, unless the amount offered has been paid into Court. *Clark, Administratrix, &c.* v. *Dann*, 513

COSTS OF THE DAY.

See ERROR, 2.
PAUPER, 2.

COUNSEL'S SIGNATURE.

The signature of counsel to special pleas need not be stated in making up the issue. *Jefferies* v. *Yeblonski*, 807

COURT BARON.

See FALSE JUDGMENT.

COURT OF REQUESTS.

Where a cause of action to which the provisions of the 23 Geo. 2, c. 30, s. 5, (The Tower Hamlets Court of

Requests' Act) extend, is made the subject of an action in the superior Courts, and tried on a writ of trial before the secondary, and a verdict is found for less than 40*s*., it is competent for the defendant to avail himself of the objection by suggestion under sect. 7, although the secondary has not power to certify under sect. 8. *Capes* v. *Jones*, 779

CREDITORS.

See DECLARATION, 4.

CRIME COMPOUNDING.

See COMPOUNDING CRIME.

CROWN.

1. In an information by the Attorney General under the Customs' Act, the Court has no power to direct a commission for the examination of a witness abroad on behalf of the defendant; nor will the Court postpone the trial for the purpose of compelling the Crown to consent to such commission. *Attorney General* v. *Bovet*, 492

2. An action of trespass quare clausum fregit having been brought in the Court of Common Pleas, the defendant pleaded that the locus in quo was part of a forest belonging to the Crown, and that he, as servant of the Crown, committed the alleged trespass. The replication put in issue the title of the Crown: *Held*, that after notice to the plaintiff, the cause might be removed into this Court by rule absolute in the first instance, upon the mere statement of the Attorney General (without affidavit) that the interest of the Crown came in question. In such a case two days' notice of the motion is sufficient. *The Attorney General* v. *Hallett*, 685

CULTIVATION.

See REPLICATION, 6.

CUSTOMS.

See CROWN, 1.
PLEA, 17.

DAY (FRACTION OF A).

See NOTICE (OF APPEAL).

DE INJURIA.

See REPLICATION, 3, 4.

DEATH.

See ARBITRATION, 7.
JUDGMENT, NUNC PRO TUNC.

DECLARATION.

1. Where a statute requires certain qualifications in persons acting under it, and provides that in an action for penalties for acting without qualification, the defendant shall prove that he was duly qualified, it is sufficient to allege in the declaration that the defendant was not qualified, without specifying in what his disqualification consisted. *Cook* v. *Swift*, 67

2. Since the rule of H. T., 4 Wm. 4, r. 6, the venue is the county for all purposes: therefore, in declaring for a penalty, it is not necessary to aver that the offence was committed within the county in which the venue was laid. *Ib.* 67

3. In an action of debt on a promissory note, the declaration stated that the defendant promised to pay the plaintiff or his order 690*l*., on a day not laid under *a videlicet*, and thereupon the defendant agreed to pay the amount of the said note to the plaintiff on request: *Held*, not double; and that it sufficiently appeared by reference to the commencement of the action, that the note had become due, without the usual allegation, "which period has now elapsed." *Shepherd* v. *Shepherd*, 199

4. A declaration in debt by the assignee of an insolvent debtor, stated that the plaintiff had brought an action

against the defendant to recover a debt due to the insolvent; that after issue joined, the cause was referred to arbitration by order of nisi prius. The declaration then alleged mutual promises to abide by, perform, and fulfil the award; and that the arbitrator awarded that the plaintiff was entitled to recover a certain sum: breach, non-payment.

Held, on special demurrer, that the allegation of mutual promises rendered the declaration bad.

Held also, that it need not appear by the declaration that the submission to arbitration was with the consent of the major part of the creditors of the insolvent; and *semble*, that the absence of such consent would not vitiate the award. *Sutcliffe* v. *Brooke*, 302

5. Assumpsit. The declaration stated that the defendant and A. were in partnership as attorneys, and in consideration that the plaintiff would retain them as such attorneys, to conduct an action at the suit of B. against one L. for negligent driving, the defendant and his partner promised to fulfil their duty as such attorneys in and about prosecuting the said action, and recovering damages: it then alleged that the defendant and his partner did, under the said retainer, commence an action against L., and such proceedings were thereupon taken that B. recovered judgment against L. for 56*l*. 15*s*.: that afterwards the defendant and his said partner, *as such attorneys as aforesaid*, for obtaining satisfaction of the said damages, sued out a writ of fi. fa., to which the sheriff returned that he had levied 9*l*., part of the damages, and nulla bona as to the residue: that the defendant and his said partner, *as such attorneys as aforesaid*, for obtaining satisfaction of the said residue, issued a ca. sa., by virtue whereof L. was imprisoned, and paid the residue of the damages to the governor of the gaol, who paid the same to the defendant and his partner, *as such attorneys as aforesaid*: that before they received the same they sent, as such attorneys as aforesaid, to the gaoler, a discharge of L. out of custody, by virtue whereof he was discharged. Breach: that although the defendant and his partner received the said damages, and the plaintiff duly paid to them, as such attorneys as aforesaid, their costs and charges of prosecuting the said action, yet they had not paid to B. or the plaintiff, the residue of the said damages.

Held, that the declaration was bad on special demurrer, for not shewing with sufficient certainty that the money which the defendant had received and not paid over, was money received by the defendant and his partner as attorneys in the action, under the retainer.

Held also, that the original retainer was not determined by the judgment; but continued afterwards so as to warrant the attorney in issuing execution within a year and a day; or afterwards, in continuation of a former writ of execution issued within that time; and also to warrant his receiving the damages without a writ of execution (*a*).

(*a*) The reader is requested to cancel the marginal note, *ante*, p. 309, and to substitute the above. *Bevins* v. *Hulme*, 309, 722

6. Assumpsit. The declaration alleged that "there had been, and then were, divers accounts between the plaintiff and the defendant, which accounts were open and unsettled," and that there were divers disputes between the plaintiff and the defendant touching the said accounts, and that the plaintiff claimed of the defendant that he was indebted to him in a large sum of money, and that the defendant claimed of the plaintiff that he, the plaintiff, was indebted to the defendant; and then that it was agreed that each party should withdraw his

claim, and that the defendant should pay the plaintiff an annuity of 6*l.* for life. It then alleged, that in consideration that the plaintiff would withdraw his claim, the defendant promised to pay the annuity. Breach, non-payment of the annuity. Plea, non assumpsit: *Held*, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration on which to maintain an assumpsit on the defendant's promise. *Llewellyn* v. *Llewellyn*, 318

7. Declaration on a bond under 1 & 2 Vict. c. 110, s. 8, given by the defendant and others, his partners in trade, stated that judgment was recovered in an action for the original debt, which was not paid; and that a Judge's order was made to render the principals within ten days, which time was enlarged without prejudice by another Judge's order; that a rule nisi was obtained within that period, calling on the plaintiff to shew cause on a subsequent day why the defendant and his bail should not have further time to render, and that in the meantime proceedings against the defendant and his bail should be stayed; and that neither the defendant nor his co-debtors rendered themselves according to the practice of the Court, or within the time mentioned in either of the orders, or within any other time, or in any manner directed by the Court or any Judge thereof: *Held*, first, that a plea which alleged that no writ of ca. sa. had issued in the original action was good. Secondly, that a plea which averred that the Judge's order had been obtained ex parte by the plaintiff, was bad. Thirdly, that a plea which alleged that the rule nisi in the declaration alleged was made absolute on the twenty-second day of Term, giving further time to render, and that a render was made within that time, was good. Fourthly, that a bond under 1 & 2 Vict. c. 110, s. 8, under such circumstances, was not a claim within the 6 Geo. 4, c. 16, ss. 51 and 56, barred by the defendant's certificate obtained after the commencement of the original action, but before judgment. Fifthly, that a plea alleging that the plaintiff had brought an action to recover the sum mentioned in the bond at the time of giving the bond, was not a bar to an action on the bond, although the judgment in respect of the debt was obtained in an action subsequently commenced. *Hinton* v. *Acraman*, 426

8. Assumpsit. The declaration alleged a promise to marry "within a reasonable time after the defendant should be thereunto requested by the plaintiff;" and without averring a request, stated for breach that the defendant had wrongfully married another person. Plea, that the defendant was never requested to marry the plaintiff; *Held*, on special demurrer, that the declaration was good, as shewing a breach of contract by the defendant, which dispensed with any necessity for alleging a request; and that the plea was consequently bad. *Short* v. *Stone*, 580

9. In an action of assumpsit against the proprietor of a cab for the loss of luggage, the promise of the defendant was alleged to be "safely and securely" to convey the plaintiff and his luggage: *Held*, that this allegation was sustained by the promise implied by law to use due and reasonable care in that behalf, as the allegation must be construed with reference to the character of the bailee sought to be charged. *Ross* v. *Hill*, 788

DEPARTURE.

See PLEA, 4.

DESERTER.

See PRISONER, 2.

DIES NON.

See APPEARANCE, 3.

DISCONTINUE (RULE TO).

See JUDGMENT (AS IN CASE OF A NONSUIT), 4.
STAY OF PROCEEDINGS, 1.

DISTRESS.

See REPLICATION, 8.

DISTRINGAS.

1. In the affidavit to obtain a distringas, it is not sufficient to state that the defendant has not appeared "according to the exigency of the said writ;" it ought to state generally that he has not appeared. *Drage* v. *Bird*, 617

2. Where calls had been made at the residence of the defendant, and answers given; on one occasion, that he was at home and ill, and could not be seen; and on another, that he was at home and could not be seen; and it was sworn that it was believed that the defendant was bedridden, and had been confined to his house for many years; the Court granted a distringas to compel an appearance, without the usual statement in the affidavit, of a belief that the defendant was keeping out of the way to avoid service. *Wilkins* v. *Jones*, 747

3. The Court granted a distringas for the purpose of proceeding to outlawry on an affidavit which disclosed attempts to serve the defendant at his place of business, and the leaving a copy of the process with a clerk, and also that the defendant's place of residence could not be discovered. *Rock* v. *Adam and Another*, 817

4. In an affidavit for a distringas to proceed to outlawry, it should appear that a copy of the writ of summons has been left at some place, where it is probable that being so left, it may come to the defendant's knowledge. *Vernon* v. *Pouncett*, 744

DUPLICITY.

See DECLARATION, 3.
PLEA, 6.
REPLICATION, 4, 11.

EJECTMENT.

1. Where a declaration in ejectment was intituled "Trinity Term, 9 Vict.," instead of "Trinity Term, 8 Vict.," and the notice, which was without date, required the tenant to appear in next Michaelmas Term; the Court granted a rule for judgment against the casual ejector. *Doe dem. Gyde* v. *Roe*, 309

2. Where judgment had been signed against the casual ejector: *Held*, that the tenant had no locus standi in Court before appearance, to object to the validity of the description of the premises in the declaration. *Doe dem. Williamson and Another* v. *Roe*, 928

EMBEZZLEMENT.

See WARRANT OF ATTORNEY, 3.

ERROR.

1. The Court dispensed with the attendance of the plaintiff in error to crave oyer of the record of an indictment for bigamy, for the purpose of assigning errors: where it appeared that he was resident in Australia, where he had been for the last thirty years; that he was sixty-six years of age, and subject to paralytic attacks; and that he could not make the journey to this country without injury to his health, and without considerable pecuniary loss.

Where the prosecutor and his attorney were both dead, the Court directed service of the rule to join in error to be made, by sticking it up in the Crown Office, and serving a copy on the solicitor to the Treasury. *Murray* v. *The Queen*, 100

2. Where issue is joined on error in fact, the defendant is entitled to costs

of the day for not proceeding to trial, as in other cases. *Greville* v. *Sparding and Another*, 336

ESTOPPEL.

A declaration against a witness for not attending a trial pursuant to a subpœna, alleged that the plaintiff had a good cause of action in that suit, and that the testimony of the defendant was material evidence for the plaintiff. Pleas; first, not guilty; secondly, that plaintiff could have proceeded to trial without the testimony of the defendant. Evidence was tendered on the part of the defendant at the trial, for the purpose of shewing that the plaintiff had not a cause of action in the original suit: *Held*, that as the defendant had not traversed the allegations that the plaintiff had a good cause of action, and that the evidence was material, those allegations were admitted; and that he was consequently estopped from giving the evidence tendered. *Needham* v. *Fraser*, 190

EVIDENCE (MATERIAL).

See MATERIAL EVIDENCE.

EXCISE.

See PLEA, 17.

EXECUTION.

See AWARD.
DECLARATION, 5.
FEME COVERT, 2.
SHERIFF, 1.

EXECUTOR.

See PLEA, 14, 16.

A declaration for use and occupation against executors, charging them in respect of certain premises *held* by them as executors under a demise to their testator, but not alleging any occupation by them is good, under 11 Geo. 2, c. 19, as sufficiently charging them de bonis testatoris. *Atkins* v. *Humphrey and Another*, 612

EXPENSES OF SHERIFF.

See SHERIFF (EXPENSES OF).

FALSE JUDGMENT.

On a return to a writ of false judgment of the proceedings in a Court baron to recover a debt, the Court was stated to have been held before W. K., Esq., steward of the said Court, and W. U. and W. M. and others, free suitors of the said Court: *Held*, that it was not necessary for the proceedings to shew that the steward was also steward of the manor: *Held* also, that the above was the correct style of the Court, and that it was not a necessary presumption that the steward acted judicially in the proceedings: *Held*, that it was not necessary to state the names of more than two of the suitors. *Brown* v. *Gill*, 823

FEIGNED ISSUE.

Where a feigned issue is directed under the Interpleader Act, to try the property in certain goods, it may still be framed in the form of a pretended wager, notwithstanding the provisions of the 8 & 9 Vict. c. 109, ss. 18 and 19, although a new form of issue is given by the schedule to the latter section. *Luard and Another* v. *Butcher and Others*, 815

FEME COVERT.

1. It is no objection to the issuing of a commission to take the acknowledgment of a feme covert resident beyond seas, under stat. 3 & 4 Wm. 4, c. 74, s. 83, that her Christian name is unknown; but when the commission is returned, the Court will require strict proof of her identity. *In re the Wife of George Atherton*, 26

2. Where a married woman is taken in execution on a judgment obtained in an action commenced against her when sole, the Court will

not discharge her out of custody; although it appear that she has no separate property. *Banin v. Margaret Jones*, 667

FIERI FACIAS.

A ca. sa. was issued against both defendants on the same day that final judgment was signed; and one of the defendants was taken under it, and subsequently discharged under the Insolvent Act. The plaintiff instructed the sheriff not to execute the writ against the other defendant, and the writ remained in the sheriff's hands unreturned: *Held*, that a writ of fi. fa. which was issued against the goods of the other defendant more than a year from the date of the judgment, was not irregular, for want of the writ of ca. sa. being previously returned, or of a scire facias being issued to revive the judgment. *Franklin* v. *Hodgkinson and Beale*, 554

FORCIBLE ENTRY.

See VI ET ARMIS.

FRACTION OF A DAY.

See DAY, (FRACTION OF).

GAMING.

See LOTTERY.

GENERAL ISSUE.

See LOTTERY.
PLEA, 13.

GUARANTEE.

See VARIANCE, 1, 2.

HABEAS CORPUS.

See LUNATIC.
PRISONER, 1, 2.
WARRANT, 1, 2, 3.

On motion for a habeas corpus: *Held*, that it is not necessary that a bankrupt should make and sign the declaration required by the 8 & 9 Vict. c. 48, previous to each examination. It is sufficient if he do so previous to the first examination. *In re Bull*, 763

HIGHWAY ACT.

See TAXATION, 2.

HOLDER (OF BILL).

See PLEA, 11.

HUSBANDRY, (RULE OF).

See REPLICATION, 6.

ILLEGALITY.

See WARRANT OF ATTORNEY, 3.

INCOME TAX ACT.

See PLEA, 8.

INDORSEMENT (ON PROCESS).

See IRREGULARITY.

INFANT.

See ARBITRATION, 5.
APPEARANCE, 2.
PROCHEIN AMY.

INQUISITION.

A commission tested 21st of February, and returnable 15th of April, 1843, authorized the commissioners to inquire whether D. is *now* indebted to the Crown in any and what sums. The inquisition thereon, dated 1st of March, 1843, found, that D. was, *on the day of taking the inquisition*, indebted to the Queen in a certain sum, for customs duty on silk imported by him between the 8th and 14th of February, 1841. A scire facias issued on this inquisition, tested the 30th of

March, 1843. *Held*, first, that the finding in the inquisition was not inconsistent with the authority given to the commissioners, and that the form of the commission and inquisition was according to the established precedents. Secondly, that the fact of the scire facias having issued before the commission was returnable, was a mere irregularity, and not a ground of error. *Dean* v. *The Queen (in Error)*, 714

INSOLVENT.

See DECLARATION, 4.
FIERI FACIAS.
PLEA, 9.
PRISONER, 3.
REPLICATION, 9.
SECURITY FOR COSTS.
TRESPASS, 1, 2.

INTEREST.

See AFFIDAVIT OF DEBT.

INTERPLEADER.

See FEIGNED ISSUE.
SHERIFF, 4.

The first section of the Interpleader Act does not apply to the case of a party sued by one person for the price of goods, and by another for the goods themselves. *Slaney* v. *Sidney and Others*, 250

INTERROGATORIES.

A commission to examine witnesses on interrogatories and cross-interrogatories, was sent out to Belfast, the commissioners being empowered "to put, or cause to be put additional questions, when it should appear to them to be necessary and proper." The defendant, when before the commissioners, abandoned some of his cross-interrogatories, and proposed to put additional questions, to which the plaintiff objected. The commissioners proceeded with the examinations on such questions "subject to the objections." At the trial, the answers to these questions were ruled to be inadmissible in evidence: *Held*, that the ruling was right, as the commissioners ought themselves to have decided whether the questions were necessary and proper to be put, and not to have left that question for the determination of the Court. *Williamson* v. *Page*, 14

IRREGULARITY.

See REPLICATION, 12.

The copy of a writ of summons served on the defendant was indorsed "The plaintiff claims 150*l*., and interest for debt, and 3*l*. 3*s*. costs." *Held* irregular; and that the motion was correctly made to set aside the writ of summons as well as the copy and service thereof. *Chapman* v. *Becke*, 350

ISSUE.

See COUNSEL'S SIGNATURE.

The issue on a writ of trial need not state the day of the return, but should state the teste of the writ. The Court will not, however, on account of that omission, set aside the issue, but will direct it to be amended, at the cost of the plaintiff. *Jefferies* v. *Yablonski*, 307

ISSUES, (SEVERAL).

See ARBITRATION, 4.

JUDGE'S ORDER.

See ORDER OF JUDGE.

JUDGMENT.

See REPLICATION, 3.

JUDGMENT (AS IN CASE OF A NONSUIT).

See STAY OF PROCEEDINGS.

1. A plaintiff being under a peremp-

tory undertaking to try at a particular sittings, entered his cause accordingly; but in consequence of the press of business it was made a remanet: *Held*, that there was no default on the part of the plaintiff. And the defendant having obtained a rule absolute for judgment as in case of a nonsuit, the Court set it aside. *Lawley* v. *Dubourg*, 80

2. After issue joined, and notice of trial given in a town cause for the sittings after Easter Term, it was made a remanet to the sittings after Trinity Term. The plaintiffs then made default: *Held*, that the defendant was entitled to move for judgment as in case of a nonsuit. *Ladbroke and Others* v. *Williams*, 868

3. Issue was joined on the 3rd of June, 1844, and notice of trial given for the adjourned sittings after Trinity Term, 1844, which was afterwards postponed by consent to the sittings after Michaelmas Term in the same year. The record was at those sittings withdrawn, on the ground of the absence of some material witnesses on the part of the plaintiff. In Trinity Term, 1845, the plaintiff obtained commissions to examine his witnesses abroad, and in July in the same year, the defendants also obtained a Judge's order for a commission to issue to examine witnesses on their behalf, which order contained the usual proviso, that the trial of the cause should not be proceeded with till the return of the commission. The defendants did not issue any commission: *Held*, that they had waived any right they might have had to move for judgment as in case of a nonsuit. *Bordier* v. *Barnett and Others*, 870

4. A rule to discontinue on payment of costs is no stay of proceedings; therefore where a plaintiff served a rule to discontinue, with an appointment to tax costs, and on the following day the defendant obtained a rule absolute for judgment as in case of a nonsuit: *Held*, that the judgment was regular. *Beeton* v. *Jupp*, 474

JUDGMENT NUNC PRO TUNC.

Where there were issues of fact and of law, and after verdict for the plaintiff on the former, and a rule for a new trial, which was discharged, the plaintiff, in the same Term in which the rule was discharged, set down the demurrer in the special paper, but died before it came on for argument; judgment having been subsequently given for him on the demurrer, the Court made absolute a rule to enter up judgment as of the Term in which the demurrer was set down for argument. *Miles* v. *Bough*, 105

JUDICIAL NOTICE.

See REPLICATION, 7.

JURAT.

See AFFIDAVIT, 2.

JURISDICTION.

See ORDER OF REMOVAL, 1.
ORDER OF SESSIONS, 1.

LACHES.

See ATTORNEY'S UNDERTAKING, 2.

1 Notice of trial having been given for the first sittings in Term, the 16th of April, the defendant obtained a rule for a special jury on the 9th, which he served on the plaintiff on the 13th. The Master's office was closed on the 10th for the holidays, and remained so till the 15th; on which day the defendants served another copy of the rule on the plaintiff, together with an appointment to nominate the jury on the 18th. *Held* that the defendants had been guilty of no laches; and the Court therefore refused to discharge the rule for a special jury. *Gurney* v. *Gurney and Chapman*, 734

2. Where proceedings are taken against good faith, the party must come promptly to set them aside, as in the case of an irregularity. Therefore where a judgment was signed against good faith, of which the defendant had notice on the 6th of April, an application to set it aside on the 20th of the same month was held too late. *Saunders and Another, Assignees* v. *Jones*, 770

LANDLORD AND TENANT.

See STAYING PROCEEDINGS, 2.

LEASE.

See SHERIFF, 1.

LEAVE AND LICENSE.

See PLEA, 1.

LIBEL.

See PLEAS (SEVERAL).

LIBERUM TENEMENTUM.

See REPLICATION, 1, 2.

"Liberum tenementum" is a good plea to trespass for breaking and entering the plaintiff's dwelling-house, though the premises are particularly described in the declaration. *Harvey Bridges and Others*, 55

LIMITATIONS, (STATUTE OF).

See SCIRE FACIAS.

STATUTE OF LIMITATIONS.

LOTTERY.

In an action for money had and received, the defendant pleaded, that a horse-race being about to be run, the plaintiff and one hundred and fifty-four other persons subscribed 1*l.* a piece, which was deposited with the defendant on the terms that the name of each subscriber should be written on a card, and the name of each of the horses written on another, and then the two sets of cards placed respectively in a box, and the cards should be drawn by chance from each of the boxes, and the person whose name should be drawn next after the name of the winning horse, should be entitled to receive 100*l.* from the entire fund: *Held*, an illegal lottery within 10 & 11 Wm. 3, c. 17, and 42 Geo. 3, c. 119, and therefore, that the plaintiff, who was the winner, could not recover the amonnt from the stakeholder; also, that if not an illegal lottery, it was an illegal bet: also, that the plea did not amount to the general issue, but was a good plea in confession and avoidance. *Allport* v. *Nutt*, 233

LUNATIC.

The return to a habeas corpus to bring up the body of an alleged lunatic, stated that, "on, &c., under the authority and in pursuance of the act of Parliament," &c. (2 & 3 Wm. 4, c. 107,) "R. F. in the said writ named was committed under our custody, and was received into and detained in the Newcastle Lunatic Asylum," &c., and that "on the day and year aforesaid," an order and medical certificates were received, which were as follow:

It then set out the order for the reception of the lunatic, with the signature of the patient himself at the foot of it, instead of that of his wife, who was the party named in it as giving the order, and who had also signed the order in a different place; and also medical certificates. It likewise set out a subsequent order under the 8 & 9 Vict. c. 100, and medical certificates, and justified the detainer of the lunatic under the latter order.

Held, that it sufficiently appeared, on the face of the return, that the first order and medical certificates

were received at the same time with the lunatic; that under the 2 & 3 Wm. 4, c. 107, the first order was a sufficient justification of the detainer; that it was not necessary to obtain an order for his detainer under the 8 & 9 Vict. c. 100; and that the return need not shew who delivered the first order.

Semble, that a medical certificate under the 8 & 9 Vict. c. 100, s. 46, should state specific facts on which the opinion of insanity has been formed; and that therefore the statement that the patient has "a general suspicion of the motives of every person" is insufficient. *In re Fell*, 373

MAGISTRATE.

See CERTIORARI, 1.
ORDER OF REMOVAL, 1.

MANDAMUS.

See ORDER OF REMOVAL, 2.
QUARTER SESSIONS, 2.

1. By the Norwich and Brandon Railway Company Act, 7 Vict. c. 15, (local personal and public) s. 221, the company were empowered to build and repair a bridge over a certain river, keeping a certain height above the water, and a certain width of waterway. They had proceeded in the construction of the bridge, leaving a less width and height than prescribed; whereupon the proprietors of a mill on the river whose flow of water was injured thereby, wrote requiring them to make it of the width and height prescribed by the act. To this the solicitors of the railway company replied that the company would make it of the required height, but as to the other matter referred to in the letter, they were instructed to accept service of any process with the parties might think proper to issue. A second, and then a third letter were written requiring compliance, to which the company returned no answer. It however appeared that the company had since proceeded to make some of the alterations required: *Held*, that under these circumstances, there had been a sufficient refusal to warrant the issuing a mandamus.

The same section which empowered the company to build and repair the bridge, enacted that in the event of the bridge not being built, maintained and repaired, it should be lawful for the owner of adjoining lands to do so, and for a justice of the peace to order the company to pay him the expenses of doing: *Held*, that the parties were not compelled to take the course pointed out by this section: but might proceed by mandamus. *Regina* v. *The Norwich and Brandon Railway Company*, 385

2. By the London and Blackwall Act, 6 & 7 Wm. 4, c. 123, (local and personal public) sect. 27, the costs, &c. of a jury to assess compensation are, where the jury find a greater sum by their verdict than that offered by the company, to be borne by the company, and "such costs, charges, and expenses shall be settled and determined by the sheriff," &c., with a power of distress, in case the same shall not be paid within a limited time. By the 37th sect. the costs of deducing title are to be borne by the company; and by sect. 38, in case the parties cannot agree as to the amount of such costs of deducing title, &c., they are to be ascertained by one of the Masters of the Court of Exchequer, and that Court may order their payment accordingly: *Held*, that the Court would not grant a mandamus to the company to pay the costs of an inquiry, and of deducing title to premises injured by the proximity of the railway, where the amount of such costs had not been first ascertained in the mode pointed out by the act. *Regina* v. *The London and Blackwall Railway Company*, 399

MANOR.

See False Judgment.

MATERIAL EVIDENCE.

See Venue, 2.

MEMORANDUM.

TRINITY TERM.

In this Term, in pursuance of an arrangement made by the Court in last Easter Term, certain enlarged rules were for the future to be selected, and to be taken in the Bail Court; and two, or any other small number, were to be called on each day, till the whole were disposed of, 91

MISCARRIAGE.

See New Trial, 1.

MUNICIPAL CORPORATION ACT.

See Venue, 1.

MUTUAL PROMISES.

See Declaration, 4.

NE UNQUES EXECUTOR.

See Plea, 16.

NEW ASSIGNMENT.

See Replication, 10.

NEW TRIAL.

1. Upon the trial of a cause, in which three issues were raised, each going to the whole cause of action, it was agreed on both sides that the verdict should be taken by the associate in the absence of the Judge, who, before he retired from the Court, directed the associate to take the verdict upon each of the issues separately. Upon the return of the jury, the associate asked them whether they found for the plaintiff or the defendant; and the foreman answered "for the plaintiff." The defendant's counsel requested the associate to put the questions left to the jury by the Judge, to which the plaintiff's counsel objected; whereupon the associate refused to put the questions, and ultimately a general verdict was entered for the plaintiff: *Held*, that the neglect to take the verdict upon each of the issues, was a miscarriage on the part of the officer of the Court in taking the verdict; and the Court, therefore, made a rule absolute for a new trial, without costs on either side. *Bentley* v. *Fleming*, 23

2. Where a verdict has been found for one of several defendants, and against the others, and the latter apply to set it aside; the rule should call on the successful defendant, as well as the plaintiff, to shew cause. *Belcher* v. *Magnay and Others*, 70

3. Where a rule is made absolute for a new trial, and no mention is made of the costs of the rule, neither party is entitled to them. *Eccles and Another* v. *Harpur*, 71

4. A rule to discharge a rule for a new trial, on the ground that the party has neglected to pay costs, is in this Court a rule nisi, which makes itself absolute, unless cause be shewn within a limited time. *Phillips* v. *Warren*, 301

NON-JOINDER (OF PARTIES).

See Abatement, 1, 2.

NOTICE (OF APPEAL).

See Quarter Sessions, 1, 2.

1. A local act required seven days' notice "at least" to be given by an appellant of his intention to bring an appeal. Notice was served on the 31st of December. The sessions

commenced on the 7th of January, on which day appeals were entered, but not heard till a subsequent day: *Held*, first, that the notice was insufficient, as both the day of giving the notice, and the day of holding the sessions, must be excluded; and that the day of bringing an appeal is the day on which it is entered, not that on which it is heard: secondly, that the fraction of a day cannot be taken into consideration in such a case. *Regina* v. *The Justices of Middlesex*, 109

2. Where by the practice of sessions twenty-eight days' notice of trial was required to be given in the case of respited appeals, and where that notice had not been given, and the sessions therefore refused to hear the appeal, and confirmed the order of removal: *Held*, that the practice was not so unreasonable as to induce this Court to grant a mandamus, commanding the sessions to enter continuances and hear the appeal.

The quarter sessions are the judges of their own rules of practice; and this Court will not interfere with their determination respecting them, unless the rules on which they have acted are so unreasonable as to be illegal. *Regina* v. *The Justices of Montgomeryshire*, 119

3. A notice of appeal, against an order of removal, beginning "We the undersigned, being a majority of the churchwardens and overseers of the parish of," &c., and signed by one churchwarden and four overseers, (there being six altogether in the parish), is sufficient; without stating that they were the majority at a meeting duly convened. *Regina* v. *The Justices of the West Riding of Yorkshire* (*St. Pancras* v. *Bradford*), 152

4. A notice of appeal against an order of removal was in the following terms: "take notice, that we being a majority of and acting for and on behalf of the churchwardens and overseers of," &c., "and that the grounds of *our* appeal," &c., and was signed by one person, "churchwarden of," &c., and by four persons, "overseers of," &c. It appeared that there were two churchwardens and four overseers of the appellant parish, and no more. The quarter sessions having decided that the notice was insufficient, and refused to hear the appeal: *Held*, that the notice was good, as sufficiently shewing that it was an appeal by and on behalf of the whole body of parish officers; and that the decision of the quarter sessions on the point was a decision on a preliminary objection, and, therefore, that this Court would grant a mandamus, commanding them to enter continuances and hear the appeal. *Regina* v. *The Justices of Surrey*. (*St. Anne, Westminster*, v. *St. Mary, Magdalen, Bermondsey*), 573

5. The 8 & 9 Vict. c. 10, s. 3, requires notice of the entering into recognizances to try a bastardy appeal, to be "forthwith" given to the mother of the child, and it also provides that the sending such notice by post shall be sufficient: *Held*, that the sessions were right in refusing to hear an appeal, where an interval of seventeen days had been suffered to elapse between the entering into the recognizances and serving the notice on the mother; although it was shewn that the delay that had occurred, was owing solely to the appellant having sought to effect a personal service on the mother. *Ex parte Lowe*, 737

NOTICE (OF INQUIRY).

Where the plaintiff had given a fourteen days' notice of a writ of inquiry in an action in which the venue was laid in Middlesex, and afterwards gave a notice of continuance, which was not sufficient if the defendant resided more than forty miles from

London: *Held*, on motion to set aside the execution of the writ of inquiry, on the ground of the insufficiency of the notice of continuance, that the defendant's affidavit was sufficient which described him as "of Ragland," in the county of Monmouth, and which stated that he had received no other notice of continuance than the one so given, and that Ragland was one hundred and thirty-six miles from London; although it did not state in positive terms that he resided at Ragland. *Saunders and Another Assignees* v. *Jones*, 770

NOTICE (TO PRODUCE).

In an action on a bill of exchange to which the defendant pleaded fraud, it was held that notice to produce the bill left in the letter-box of the office of the plaintiff's attorney at half-past eight o'clock in the evening before the trial, was too late. *Held*, also, that the plaintiff was not bound to produce the bill without notice. *Lawrence* v. *Clark*, 87.

NOTICE (OF TRIAL).

In a London cause, which stood for trial for the first sittings in Michaelmas Term, the plaintiff, on the 24th of November, gave notice of continuance to the first sittings after Term: *Held*, that although this was virtually a notice for the adjournment day, the 15th of December, and the plaintiff had therefore full time to countermand the first notice, and give a fresh notice of trial; that he was not bound to do so, and that the notice of continuance was sufficient. *Toulmin* v. *Elgie*, 558

NUL TIEL RECORD.

See REPLICATION, 12.

On plea of nul tiel record, it is no objection that the award of the venire and the distringas are cancelled by lines being drawn across them. *Hodgson* v. *Chetwynd*, 45

ORDER (OF AFFILIATION).

See BASTARD.

ORDER (OF JUDGE).

Semble, that the order promulgated on the 12th of June, 1845, respecting Judges' orders for judgment does not necessarily render an order actually made; though the execution of the consent may have been improperly attested. *Dixon* v. *Sledden*, 697

ORDER OF THE JUDGES.

12th June, 1845.

"We have considered the means best calculated to prevent parties from fraudulently obtaining Judges' orders for signing judgment, and recommend that the following precautions be adopted:—

"That all written consents, upon which such orders are obtained, shall be preserved in the chambers of the respective Courts.

"That in actions where the defendant has appeared by attorney, no such order be made, unless the consent of defendant be given by his attorney or agent.

"That where the defendant has not appeared, or has appeared in person, no such order be made, unless the defendant attend the Judge, and give his consent in person, or unless his written consent be attested by an attorney acting on his behalf; but we think that these precautions unnecessary, where the defendant is a barrister, conveyancer, special pleader, or attorney.

"We think that Sunday ought to be counted as one of the four days between the delivery of paper books and the day of argument, except it be the last, when it is to be omitted, according to the general rule." 248

ORDER (FOR PROTECTION).

See PLEA, 21.
TRESPASS, 1, 2.

ORDER (OF REMOVAL).

See QUARTER SESSIONS, 1.

1. An order of removal was drawn up in the following form: "Borough of King's Lynn, in the county of Norfolk; (in the margin) Upon complaint of the churchwardens and overseers of the poor of the parish of St. Margaret in the borough of King's Lynn aforesaid unto us, whose hands and seals are hereunto set, two of her Majesty's justices of the peace in and for the said borough," &c., that S. W. and her six children, inhabitants of the said parish, "are now actually chargeable to the said parish," "we the said justices, upon due proof made thereof, as well upon the examination of the said S. W. of S. H. and of J. H., upon oath; as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge that the lawful settlement of them the said S. W. and her said children is in," &c. The order concluded in the usual form "Given," &c., without stating where it was made. *Held*, that it sufficiently appeared upon the face of this order:—

First, that the justices were acting within their jurisdiction.

Secondly, that the evidence upon which the justices had proceeded was legal evidence, and that the words "as otherwise," would not be intended to mean evidence not upon oath.

Thirdly, that the adjudication of the settlement was made at the same time and place as, and upon, the hearing of the evidence. *Regina* v. *The Recorder of King's Lynn*, 725

2. Where the name of one of the justices signing an order of removal was so illegibly written in the copy of the order sent to the appellant parish, (although legible enough in the copy of the examinations,) that the parties gave their notice of appeal as against the order of A. B. and *Jonah Walter*, instead of A. B. and *Josiah Wilson*, (the real name of the justice) and the appeal was entered at the sessions, as against the order of A. B. and *John Walter*; the sessions refused to entertain the appeal, on the ground of the misdescription: this Court granted a mandamus, compelling them to enter continuances and hear the appeal. *Regina* v. *The Justices of Middlesex.* (*St. Pancras* v. *St. John, Hackney*). 745

ORDER (SERVICE OF).

See SERVICE OF ORDER.

ORDER (OF SESSIONS).

1. An order in bastardy under the 7 & 8 Vict. c. 101, s. 3, stated that application had been made and summons granted by a justice of the peace "usually acting in" the division in which the mother resided: *Held*, that under the 8 Vict. c. 10, the word "in" was to be taken to be synonymous with the word "for," contained in the forms given in the schedule to that act; and that, consequently, the order shewed jurisdiction on the part of the magistrate granting the summons. *Regina* v. *Milner, Clerk, and Another*, 128

2. An order in bastardy omitted to state on the face of it that the application for it had been made within forty days from the service of the summons upon the putative father (7 & 8 Vict. c. 101, s. 4:) *Held* bad, as not shewing jurisdiction on the part of the justices making it. *Regina* v. *Thomas Bailey Rose and Philip B. Broade, Esqrs.*, 359

3. A notice to justices under the 13 Geo. 2, c. 18, s. 5, of an intention to move for a certiorari "in six days from the giving of this notice, or as soon after as counsel can be heard," is sufficient, *Ib.*

OUTLAWRY.

See DISTRINGAS, 3, 4.

OVERSEER.

See NOTICE OF APPEAL, 3, 4.

OYER.

See ERROR, 1.

PARTICULARS.

See APOTHECARY.

In an action by a surveyor, it is sufficient to state in the bill of particulars that the plaintiff claims a certain sum in respect of a survey between certain places, including travelling expenses and assistance, without specifying the number of fields surveyed, the time he was engaged, and the number of persons employed, or distinguishing what is charged for his own time and labour, from the charge for that of others. But such particular must specify the sums paid for the defendants' use. *Rennie and Another* v. *Beresford and Others*, 464

PARTNER.

See PLEA, 20.

PAUPER.

1. A plaintiff suing in formâ pauperis, and conducting himself vexatiously, may be called upon by the same rule to shew cause why he should not pay the costs of the day for not proceeding to trial, as well as be dispaupered. *Bedwell* v. *Coulstring*, 767

2. The Court compelled a pauper to pay the costs of the day for not proceeding to trial pursuant to notice, the cause of his default being a mistake of his attorney's clerk in preparing the jury process. *Hodges* v. *Topliss and Another*, 766

PAYMENT (INTO COURT).

See COSTS, 2.
PLEA, 18.

PAYMENT (PLEA OF).

See PLEA, 15.
REPLICATION, 2.

PENALTY.

See DECLARATION, 1.

PEREMPTORY UNDERTAKING.

See JUDGMENT (AS IN CASE OF A NONSUIT), 1.

PLEA.

See DECLARATION, 8.
LIBERUM TENEMENTUM.
LOTTERY.
REPLICATION, 8.

1. To an action on the case by a reversioner for an injury to his reversionary interest, the defendant pleaded that he was the occupier of the adjoining house and wall, and that whilst he was repairing his dwelling-house, by accident and against his will, and without any default on his part, it fell down; and in falling, fell upon the adjoining wall and close of the plaintiff, and threw the plaintiff's wall down; that thereupon the defendant, within a reasonable time, rebuilt the wall at his own expense, and in so doing committed the grievances mentioned in the declaration, quæ est eadem: *Held*, bad on special demurrer, for not shewing that the defendant had the leave and license of the tenant or of some party having authority, to allow him to come on the land. *Taylor* v. *Stendall*, 161

2. To assumpsit for goods sold and delivered, the defendants pleaded, that at the request and by the direction of the plaintiff, they delivered the goods to one K., on a day named, and that

it was "then," to wit, on the day and year aforesaid, in consideration thereof agreed by and between the plaintiff and the defendants, that the plaintiff should accept such delivery to K. in full satisfaction and discharge, &c., and that the plaintiff did "then" accept such delivery in full satisfaction and discharge. *Held*, on special demurrer, that the plea was bad, for not shewing with sufficient certainty that the agreement by the plaintiff to accept the delivery to K. in full satisfaction, &c., was antecedent to, or at least contemporaneous with, the delivery to K. *Stead* v. *Poyer and Another*, 209

3. To covenant for rent, the defendant pleaded as to 2*l.* 0*s.* 10*d.* parcel, &c., that before any part of the rent became due, to wit, on, &c., a large sum of money, to wit, 2*l.* 0*s.* 10*d.*, "being at and after the rate of 7*d.* for every 20*s.* of the annual value, to wit, 70*l.*, of the said messuage," &c., was duly, and according to the form of the statute in such case made and assessed on the said messuage, &c., in respect of the property thereof, for the year then next ensuing;" and that the defendant then being the occupier and tenant thereof, paid that sum to the collector; and that the defendant had never since made any payment to the plaintiff on account of the said rent: *Held*, on general demurrer, that this was a good plea under the Income Tax Act, 5 & 6 Vict. c. 35.

The defendant also pleaded as to 52*l.* 0*s.* 10*d.* parcel, &c., that the plaintiff himself held under a lease, with a clause of re-entry in case of breach; that he committed a breach; that "by reason and in consequence of the said forfeiture," John Doe brought his action on the demise of the superior landlord, the date of which was laid on the day of the forfeiture, and before the rent accrued due; that judgment was recovered, and notice thereof given to the defendant, who was compelled to pay the rent to the superior landlord: *Held*, on special demurrer, that the plea was good; it not being alleged as a ground of demurrer that it was not shewn that the ejectment proceeded on the ground of the forfeiture.

Quære, even if it had been alleged, would not the plea have been good? *Franklin* v. *Carter*, 213

4. A declaration alleged that T. made his bill of exchange, and thereby required G. and Co. to pay to the order of the defendant 200*l.*; that the defendant indorsed the bill to the plaintiff; and that G. and Co. did not pay it, although it was duly presented to them for payment. Plea, that after the indorsement to the plaintiff, and before it was due, he indorsed it to some person unknown, who presented it to G. and Co. for acceptance; that G. and Co. refused to accept it; and that the defendant had no notice of non-acceptance. On motion to enter judgment for the plaintiff, non obstante veredicto: *Held*, that the plea was good.

Semble, that it would have been a departure to have replied that the person unknown indorsed the bill to the plaintiff for value, and that the plaintiff had no knowledge of the dishonour by non-acceptance. *Bartlett* v. *Benson*, 274

5. To debt on bond, the defendant, after craving oyer of the condition (which was for the performance of the covenants of an indenture) pleaded that no cause of action, by reason of any breach of the condition of the bond, or of the covenants of the indenture, accrued at any time within twenty years next before the commencement of the suit: *Held*, bad on special demurrer.

Semble, that the plea should have set out the indenture, and averred performance of all the covenants which were performed within twenty years, and admitted breaches of all those

covenants which had been broken before that time; and, as to those breaches, have pleaded the Statute of Limitations. *Sanders, Executrix*, v. *Coward*, 281

6. The first count of a declaration stated, that whereas the defendant had become and was tenant to the plaintiff of certain rooms, on the terms that the defendant should not allow any nails to be driven into the wall, and that if any damage should arise from his so doing, he should pay the costs of repairing the same on his vacating the premises; and that in consideration thereof, the defendant promised the plaintiff not to allow any nails to be driven as aforesaid, and that if any damage should arise therefrom, he would pay the costs of repairs: Breach, that defendant pulled down bells, and drove nails into the walls, and that the costs of repairing the injuries amounted to 150*l.*; yet the defendant has not paid that sum *to the plaintiff*. Plea, that after the making of the promise so far as relates to the driving of the nails, the defendant did pay the costs of repairing the injuries occasioned thereby: *Held*, on special demurrer, that the plea was bad, for professing to answer the whole count, and answering but a part; and that the breach in the first count properly alleged non-payment of the costs *to the plaintiff*; and that the count was not bad for omitting to state that the defendant became tenant at the request of the plaintiff.

The second count of the declaration alleged, that in consideration that the plaintiff would permit a brass plate to be fixed on the outer door of the premises, the defendant promised to cause a new door to be put up at the expiration of the tenancy: breach, that he did not do so. Plea to the second count, that before any cause of action accrued, the defendant offered to cause a new door to be affixed; but that the plaintiff refused to allow him so to do, and discharged him from carrying the said agreement into execution: *Held*, on special demurrer, that the plea was bad for duplicity. *Dietrichsen* v. *Giubilei*, 292

7. To debt on a replevin bond, setting out the record in the former action, the defendant pleaded nul tiel record, with a conclusion to the country: *Held*, that the plaintiff was not bound to demur; but might treat the conclusion as surplusage; and reply, taking issue on the plea of nul tiel record in the ordinary form. *Townsend and Another, Assignees*, v. *James Smith*, 323

8. Assumpsit for not delivering within a reasonable time certain railway shares. The plaintiffs averred that they had been "always from the said time of making the said agreement and promise, ready and willing to accept the transfer of the said interest and shares." The defendant pleaded "that the plaintiffs were not always from the time of making of the said agreement and promise in the declaration mentioned, ready and willing to accept the transfer of the said interest and shares:" *Held*, that the plea was too large a traverse, and, therefore, bad. *Tempest and Another* v. *Kilner*, 407

9. A plea of discharge under 5 & 6 Vict. c. 116, s. 10, ought to shew that the final order was for "distribution" as well as protection. *Erle*, J., dissentiente.

But *semble*, that if it disclosed a compliance with the provisions of sect. 4, it would be sufficient.

The plea should conclude with a verification. *Gillan* v. *Deare*, 412

10. A declaration alleged, that in consideration that the plaintiff promised to marry the defendant, the defendant promised to marry the plaintiff; that the plaintiff has always been ready and willing to marry him; yet the defendant, not regarding his promise, married another woman.

Plea, that defendant was not requested by plaintiff to marry her: *Held*, on special demurrer, that the plea was bad, and the declaration good, although the latter contained no averment that a reasonable time had elapsed. *Caines* v. *Smith*, 462

11. To an action by indorsee against acceptor of a bill of exchange drawn by W. The defendants pleaded, fourthly, that after they accepted the bill, and before it was indorsed to the plaintiff, W. waived the acceptance. Fifthly, a similar plea, alleging that the bill was indorsed to the plaintiff after it was due. Seventhly, that the bill was drawn upon the defendants as the directors of a certain company established by act of Parliament, and that they accepted it as such directors for a debt contracted by the company. Eighthly, a similar plea, denying consideration. Ninthly, a similar plea, alleging that the bill was indorsed after it was due. Tenthly, that after the bill was accepted and delivered to W., he indorsed it to H. (one of the defendants) for consideration, and that H. delivered the bill to the plaintiff, who had notice. Eleventhly, a similar plea, denying consideration. Twelfthly, a similar plea, alleging that the bill was indorsed by H. to the plaintiff after it became due. *Held*, on special demurrer, that the fourth and fifth pleas were bad, for not alleging that W. was the holder of the bill at the time he waived the acceptance.

Secondly, that the seventh, eighth, and ninth pleas were also bad, as the act of Parliament gave the directors of the company no power to accept bills.

Thirdly, that the tenth, eleventh, and twelfth pleas were bad as an argumentative denial of the indorsement of the bill to the plaintiff. *Steele* v. *Benham, Layton, and Harmer*, 506

12. The Building Act, 14 Geo. 3, c. 78, s. 100, enacts, that every action for anything done in pursuance of that act, where the cause of action arises out of the city of London, shall be laid and tried in Middlesex: that the defendants may plead the general issue, and give the special matter in evidence; and if the action be laid in any other county or place than aforesaid, the jury shall find for the defendants. The 5 & 6 Vict. c. 97, s. 3, repeals so much of any act "of a local or personal nature" as permits parties to plead the general issue, and give the special matter in evidence. In trespass for placing bricks, &c., on a wall of the plaintiff, to which the defendant pleaded not guilty by statute; *Held*, that the 14 Geo. 3, c. 78, was an act "of a local and personal nature," except as to the 84th and 86th sections: and that the defendant could not, under the general issue, avail himself of the defence that he bonâ fide believed he was acting under the provisions of that act; nor could he, under that plea, object that the venue was laid in the wrong county; but should have pleaded those matters specially.

Held also, that the New Building Act, (the 7 & 8 Vict. c. 84,) which is printed amongst the public general statutes, is an act of "a local and personal nature." *Richards* v. *Easto*, 515

13. A declaration stated, that before the making the promise thereinafter mentioned, the plaintiff had brought an action in the Exchequer against the defendant to recover a certain sum of money: that issues in fact had been joined between the parties, and notice of trial given; that in consideration that the plaintiff would forbear further proceedings until the 14th of December, the defendant promised to pay the money and costs upon that day; and that in the event of his not paying, a Judge's order should be drawn up to secure payment. There was also a count on an

account stated. Pleas: first, to the first count, that the plaintiff never had any cause of action in the action in the Exchequer, which he well knew. Second, to both counts, that the original action was brought on two cheques, and that the Judge's order was made upon certain terms, (setting them forth,) that the promise in the first count mentioned was deduced from that order, and that the promise in the second count was deduced from the order ascertaining the amount of costs due on taxation, and that the order was afterwards set aside. *Held*, upon general demurrer, that the former plea was good, and, on special demurrer, that the second plea was bad, as amounting to the general issue.

Query, if it had been objected on special demurrer, that the former plea did not shew the defendant to be in a condition successfully to defend the action in the Exchequer, would the plea have been good? *Wade* v. *Simeon*, 587

14. A plea by one of two persons charged as executors, that the other is not an executor, is bad. *Atkins* v. *Humphrey and Another*, 612

15. A plea of payment by one of several makers of a joint and several promissory note, is supported by proving a payment of the note by one of his co-makers.

Payment and acceptance of the amount of a promissory note after it becomes due, and when the holder is entitled to nominal damages, support a plea of payment and acceptance in discharge of the debt and damages: consequently the holder, after such payment and acceptance, cannot maintain an action for such nominal damages. *Beaumont* v. *Greathead*, 631

16. A plea of ne unques executor may conclude to the country. *Wood* v. *Kerry, Executor, &c.* 642

17. In an action of trespass for breaking and entering the plaintiff's dwelling-house, and seizing and laying hold of the plaintiff, the defendant paid money into Court. The plaintiff replied, damages ultra, upon which issue was joined, and a verdict found for defendant. On motion for judgment non obstante veredicto, *Held*, that the plea was good, inasmuch as by certain statutes, justices, and officers of the excise and customs, are enabled to pay money into Court in actions for trespass to the person; and that the plea need not state the particular character which they fill. *Aston* v. *Perkes*, 655

18. In an action of debt, where money is paid into Court as to part of the debt only, the plea given by the rule of Trinity Term, 1 Vict. is insufficient; it should be so framed as to answer the damages as well as the debt. *Lowe* v. *Steel and Another*, 662

19. In an action by the provisional committee of a railway company, the Court will not set aside a plea of release puis darrein continuance by one of the plaintiffs if the releasor has any interest in the concern, however small; unless a clear case of fraud be made out. *Rawstone and Others* v. *Gandell and Another*, 682

20. In an action for money had and received by several plaintiffs, the defendants pleaded, that before receiving the money the plaintiffs were in partnership, and that G., one of the partners, with the privity of the others, employed the defendants as auctioneers to put up to sale certain partnership property of the plaintiffs, which the defendants agreed to do; that at the time of such employment and sale the defendants believed G. to be the sole owner of the said property, and that they had no notice that the other plaintiffs had any interest therein; that the defendants sold the goods for the sums of money in the declaration mentioned; that after such employment, G. became indebted to the defendants for work and labour, &c.,

which debt was alleged by way of set-off: *Held*, on demurrer, that the plea was bad, as there was nothing to shew that the partner appeared as the sole owner with the consent or by the default of the other partners; it was therefore only an attempt to set off a debt due from one partner against a debt due to all. *Gordon and Others* v. *Ellis and Another*, 803

21. A defendant who has obtained a final order for protection under 5 & 6 Vict. c. 116, s. 4, may, under sect. 10, plead generally his protection, without setting out all the facts required to exist in order to procure the order. *Cook* v. *Henson*, 177

PLEA (IN ABATEMENT).

See ABATEMENT.

PLEA (OF PAYMENT).

See PAYMENT (PLEA OF).

PLEA (ISSUABLE).

To a declaration in assumpsit for money lent, money paid, and money due on an account stated, the defendant, who was under terms to plead issuably, pleaded, amongst other pleas, as to, &c., parcel, &c., accord and satisfaction, by an agreement by the plaintiff to give time in consideration of the defendant's undertaking to pay 4*s.* a week for interest until repayment of the principal, and to repay the principal as soon as his means would enable him, with an averment that the said rate of interest was different from and exceeded 5*l.* per cent. The plaintiff having signed judgment, as for want of a plea, *Held*, that the plea was an issuable plea within the terms of pleading issuably.

The declaration contained a count on a bill of exchange. The defendant paid money into Court thereon, and pleaded to the residue of declaration as above. The plaintiff having accepted the money out of Court, *Held*, on its being objected that such acceptance was a waiver of the objection to other pleas as non issuable, that it was no such waiver. *Verbist* v. *De Keyser*, 392

PLEAS (SEVERAL).

To an action for libel in a newspaper, the defendant cannot plead not guilty to the whole declaration, together with a plea of apology and payment of money into Court, as to part, under the 6 & 7 Vict. c. 96. *O'Brien* v. *Clements*, 676

POOR RATE.

See WARRANT, 2.

PRISONER.

1. Where the Court directs a writ of habeas corpus ad subjiciendum to issue, with notice to a party interested in opposing the prisoner's discharge, and the latter is remanded to his former custody, the Court do not allow the costs of the opposition. *In re Cobbett*, 79

2. Upon habeas corpus to discharge a prisoner out of custody who has been committed by virtue of an order of magistrates, under the 8 Vict. c. 8, s. 25, (the Mutiny Act) for assisting to conceal a deserter; notice of the rule should be served upon the secretary at war. *Ex parte Gale*, 114

3. A prisoner, who, at the time of a vesting order made by the Court of Insolvent Debtors on the petition of a creditor, was entitled to his discharge, on the ground of the lapse of a year without the plaintiff's having declared against him, is entitled to his discharge, notwithstanding the 41st section of 1 & 2 Vict. c. 110. *Hallett* v. *Cresswell*, 561

PROCHEIN AMY.

See ARBITRATION, 5.

Where an infant plaintiff was of too tender years to be able to write, the Court granted her petition to sue by her father as her prochein amy, on its being signed by him for her, in her name. *Eades* v. *Booth*, 770

PRODUCTION OF DOCUMENT.

The plaintiff brought his action on an agreement with the defendants to pay him a sum of 5*l.* per horse power for every steam engine they should contract to be made on his patent principle. The declaration stated that they had contracted with Messrs. F., W., and Co., for the making of a steam engine on the plaintiff's patent principle; but had refused to pay the plaintiff 5*l.* per horse power. The plea traversed in terms that the defendants had so contracted with Messrs. F., W., and Co., on which issue was joined. The Court made absolute a rule calling on the defendants to produce at the Stamp Office, for the purpose of being stamped, a letter written by Messrs. F., W., and Co., in reply to a former letter of the defendants, containing evidence of a contract for the manufacture by Messrs. F., W., and Co., of a steam engine for the defendants, on the plaintiff's patent principle. *Hall* v. *Bainbridge and Another*, 92

PROMISSORY NOTE.

See REPLICATION, 3.

PROTECTION (FROM ARREST).

See BANKRUPT.

PUIS DARREIN CONTINUANCE.

See PLEA, 19.

QUALIFICATION.

See DECLARATION, 1.

QUARTER SESSIONS.

See NOTICE OF APPEAL, 2.

1. Where an order of removal was executed on the 27th of March, and the next Easter Sessions were held on the 9th of April, consequently less than fourteen days after the removal, and the appellants took no notice of those sessions, but entered and respited their appeal ex parte at the Midsummer sessions, and gave the regular notice, &c., for the Michaelmas sessions, at which sessions the appeal was entered and determined: *Held*, that the sessions had jurisdiction over the appeal to hear and determine it, and that the appellants were not bound to have entered and respited at the Easter sessions, or to have given notice of appeal for the Midsummer sessions.

The 9 Geo. 1, c. 7, s. 8, does not apply to the *first* sessions after the removal; but to the *first practicable* sessions. *Regina* v. *The Justices of Surrey*, 343

2. The 7 & 8 Vict. c. 101, s. 4, requires notice of appeal against an order in bastardy to be given within twenty-four hours "after the adjudication and making of any such order." On an appeal coming on to be heard, it appeared that the order, a copy of which was served on the putative father, was dated on the 24th of June, and that the service on the putative father was on the 27th of June, who, within twenty-four hours afterwards, gave notice of appeal. It was objected that this notice was too late; whereupon the appellants offered to prove that the order was not drawn up or signed till the 27th of June, and that the notice was consequently in time: *Held*, that the sessions acted wrongly in refusing to receive this evidence, and the Court granted a mandamus to compel them to do so. *Regina* v. *Justices of Flintshire*, 537

RAILWAY.

See MANDAMUS, 2.

RAILWAY SHARES.

See BAIL.

READINESS AND WILLINGNESS.

See PLEA, 8.

REASONABLE TIME.

See DECLARATION, 8.
PLEA, 10.

REFERENCE.

See VERDICT.

REGULÆ GENERALES.

(*See* p. 833).

REJOINDER.

To a declaration on a promissory note, dated 15th of April, 1845, the defendants pleaded, that at the time the note was made and signed by them, they promised to pay the sum therein mentioned, without specifying any time for payment: that after the note was made and issued, and was complete and delivered to the plaintiff, the note was, by consent of the defendants, *but without the same being restamped*, altered by the plaintiff in a material part, by making the same payable on or before the 15th of April, 1845.

Replication: that before and at the time of making and issuing, and completing the note, and before the alteration was made, it was meant and intended by the plaintiff and the defendants, that the note shall be payable on the 15th of April, 1845, but by mistake the note was made and issued, and complete, without specifying any time for payment: that the alteration was made for the purpose, and with the intent of correcting the mistake.

Rejoinder, that before and at the time of the making of the note, it was not meant and intended that the note should be payable on the 15th of April, 1845.

Held, that the rejoinder was bad, for putting in issue the intention of the parties *before*, as well as *at*, the time of making the note.

Held also, that the plea was bad, for not shewing that the alteration was made under circumstances which rendered the note invalid unless restamped.

Semble, that the replication was also bad, for not shewing that the note was not complete at the time of the alteration.

Quære, whether the Stamp Acts can be pleaded, unless the want of a stamp renders the instrument void? *Bradley* v. *Bardsley and Another*, 476

RELEASE.

See PLEA, 19.
REPLICATION, 10.

RENDER.

See DECLARATION, 7.

RENEWED APPLICATION.

See ATTACHMENT, 2.

RENT.

See REPLICATION, 8.

REPLEVIN BOND.

See PLEA, 7.

REPLICATION.

1. To a declaration of trespass quare clausum fregit, containing a count for an assault; the defendants pleaded,

inter alia, lib. tenem. in J. W., and a justification, on that ground, of the trespass, and that because the plaintiff "was unlawfully in possession," the defendants, as servants of J. W., and by his command, ejected her; and in so doing, because she resisted, committed the assault. The plaintiff replied that she was lawfully possessed, and was lawfully entitled to her possession as against the defendants; with a special traverse, that the plaintiff was unlawfully in possession or occupation: *Held*, on special demurrer to the replication, that the plea was substantially one of liberum tenementum, and therefore bad, as attempting to justify an assault. *Roberts* v. *Taylor and Others*, 1

2. The declaration also contained a count de bonis asportatis. The defendant pleaded inter alia, lib. tenem. in J. W., and that J. W. leased the premises to the plaintiff, with a proviso for re-entry for non-repair: that the premises were out of repair, and that the defendants entered as the servants of J. W., and because the plaintiff was unlawfully in possession, &c. (as in the above plea); and also justifying the removal of the goods of the plaintiff, which were wrongfully placed on the premises, to a convenient distance, doing no damage to the same. The plaintiff replied as to so much of the plea as related to the last count in the declaration, that after the removal of the goods, the defendants converted them to their own use: *Held*, on special demurrer, that the replication was good, *Ib.*

3. Plaintiff declared in debt on a bond, conditioned for the payment of 1000*l.* on a day certain in pursuance of the terms of an indenture of even date therewith; and for the performance of the covenants contained in that indenture. The defendants pleaded generally performance of all things mentioned in the condition. The replication denied the payment of the sum of 1000*l.* modo et formâ and concluded to the country: *Held*, upon special demurrer to the replication, that its conclusion was proper; since to make the plea good, it must be taken to allege that the money was paid on the day mentioned in the condition.

Semble, that the plea would have been bad on special demurrer, if not general demurrer. *Roakes* v. *Manser and Others*, 17

4. To assumpsit by payee against maker of a promissory note, the defendant pleaded that the note was given for a judgment debt, and that there never was any other consideration. Replication de injuriâ. On demurrer to the replication: *Held*, that both plea and replication were bad. *Baker* v. *Walker*, 46

5. Assumpsit by the assignees of P., a bankrupt, on a policy of insurance made by P., before his bankruptcy.

Plea as to 78*l.*, that the policy was made in Scotland, that the said sum was duly fenced and arrested according to the law of Scotland, at the suit of G., for a debt due to him; that thereupon the said sum became and was, according to the law of Scotland, in custody of the law; that afterwards G. obtained judgment, which was final and conclusive against P. and the plaintiffs as his assignees; and that by the law of Scotland all right and claim of P. to the said sum have been, and still are, by reason of the premises, wholly barred, defeated, and destroyed; and the plaintiffs, as assignees, never acquired any right or title thereto.

Replication, that the defendants broke their promise of their own wrong; without this, that all right and claim of P. to the said sum is wholly barred, and that the plaintiffs, as assignees, never acquired any right or title thereto: *Held* bad for duplicity. *M'Leod and Another, Assignees*

of Pitcairn, a Bankrupt, v. *Schultze and Another*, 60

6. To a declaration on the money counts, the defendant pleaded in abatement, that he was an attorney of the Court of Queen's Bench, concluding with a verification. The plaintiff replied, that the defendant was also an attorney of the Court of Exchequer, concluding with a verification: *Held*, on general demurrer, that the replication was good in substance.

Semble, that both plea and replication should have concluded with a verification by the record. *Walford* v. *Fleetwood*, 65

7. Trespass. Plea, that plaintiff had covenanted, with a proviso for re-entry in case of breach, not to set over or otherwise part with his lease. Breach, that he did set over his lease, to wit, by pawning, pledging, and mortgaging the said indenture of lease to certain creditors; wherefore the defendant entered. Replication, that he did not set over the said indenture by pawning, pledging, or mortgaging the said indenture to the said supposed creditors: *Held*, that the replication was bad, it traversing an immaterial allegation laid under a videlicet, and therefore too large.

Another plea alleged that the plaintiff covenanted, with a proviso for re-entry in case of breach, that he would not sow, crop, receive, or take from the arable lands or any part of them, more than two crops of corn successively; but would every third year summer fallow or lay the arable land down with rye grass, and clover seeds, or plant with potatoes, or sow with peas or beans, which should be twice well hoed. Breach, that he did sow and take three crops of wheat successively, and that he did not every third year summer fallow or lay the arable, land with rye grass, and clover seeds, nor plant with potatoes, nor sow with peas, which were twice or at all well hoed; wherefore the defendant entered. Replication, that plaintiff did not sow, crop, &c., more than two crops, &c.; and did every third year summer fallow a part, &c., and lay down with rye grass, &c., another part, &c., and did sow another part, &c., with peas, and the residue of the arable land with beans, &c.: *Held*, on special demurrer, that the covenant against overcropping was distinct from that as to the mode of cultivation; that a breach of the former was well assigned, but not of the latter: that the replication was good as to the former, and not vitiated by the reference to the latter. *Hammond* v. *Colls*, 164

8. Trover for hay, corn, carts, horses, &c.; tables, carpets, chairs, &c. Plea justifying the taking of the goods under a distress for rent. Replication, that the goods were beasts of the plough and implements of husbandry, and that there was other available distress: *Held*, on special demurrer, that the Court would take notice that several of the articles enumerated in the declaration could not possibly be beasts of the plough or implements of husbandry: and that the replication was therefore ill. *Davies* v. *Aston, Knight*, 188

9. Count in trover for goods and chattels. Plea justifying the taking of them under a distress for rent. Replication, that the defendant had made a former distress for the same rent, on goods of sufficient value to satisfy the distress, and might have fully satisfied the rent out of the same; but that he wrongfully and vexatiously refused and omitted so to do. Rejoinder, that the goods and chattels, taken under the former distress, were not of sufficient value to satisfy the rent; and that the defendant afterwards lawfully abandoned and put an end to the distress, and that the rent was still in arrear. Surrejoinder, that the goods were of sufficient value: *Held*, on demurrer, that the replication was a good answer to the plea; for a landlord could not

make a second distress for the same rent, after wantonly abandoning a prior distress, where the goods taken under the first distress were of sufficient value to satisfy the rent: *Held*, also, that the plaintiff was entitled to judgment on these pleadings; for either the surrejoinder was good, if the rejoinder were to be read so as to make the insufficiency of the goods distrained the ground for abandoning the distress; or, if it could not be so read, the rejoinder was bad, for not shewing any lawful ground for relinquishing the first distress, and taking a second, so as to answer the matters alleged in the replication. *Dawson* v. *Cropp*, 225

10. To an action for goods sold, the defendant pleaded, that before the commencement of the suit, the plaintiff petitioned the Court for the relief of Insolvent Debtors, and that an order was made vesting his estate and effects in the provisional assignee of that Court. The plaintiff replied that the petition was dismissed, and the plaintiff discharged from custody, without taking the benefit of the act: *Held*, on special demurrer, that the replication was bad, for not alleging that the petition was dismissed before the commencement of the suit. *Yorston* v. *Fether*, 297

11. To a declaration in debt for goods sold and delivered, and on an account stated, the defendant pleaded, that by a certain indenture bearing date, &c. (profert) the plaintiff released to the defendant the debts and causes of action in the declaration mentioned. The plaintiff replied non est factum, on which issue was joined: *Held*, that the plaintiff under this replication could not give in evidence that the debt for which the action was brought was not included in the release; but should have new assigned. *Jubb* v. *Ellis*, 364

12. Trespass to a mill, fixtures, &c. Plea, that the defendants, as assignees of a bankrupt, became possessed of the term in the mill, and the fixtures, &c. Replication, that the bankrupt, before his bankruptcy, mortgaged the mill and fixtures, &c. to R., who entered: that it was afterwards, and before the bankruptcy, agreed between the plaintiff, the bankrupt, and R., that the plaintiff should accept a lease of the premises, and purchase the fixtures, &c., whereupon the plaintiff entered: *Held*, on special demurrer, that the replication was not ambiguous or double. *Pim* v. *Grazebrook and Another*, 454

13. In trespass for false imprisonment, the defendant justified under a ca. sa. issued on a judgment obtained against the plaintiff. Replication, that the judgment was signed on a warrant of attorney, and that the judgment and ca. sa. were set aside by a Judge's order which was afterwards made a rule of Court; on the ground that the warrant of attorney was never delivered as a complete authority to do or suffer any of the acts therein specified, but as an escrow to be kept by the plaintiff in his own possession till a certain event should happen: that the defendant, by improper contrivance, obtained and kept possession of it, without the plaintiff's consent; *Held*, first, that the replication was good, as it sufficiently appeared that the judgment was set aside, not on the ground of its being erroneous, but on the ground of irregularity, or want of good faith. Secondly, that it was not necessary to allege that the order was made a rule of Court before the commencement of the suit. Thirdly, that nul tiel record was not the proper replication to such plea. *Brown* v. *Jones and Others*, 678

REQUEST.

See DECLARATION, 8.
PLEA, 6.

RETAINER.

See DECLARATION, 5.

RULE (TO COMPUTE).

See SERVICE (OF RULE).

Judgment for the plaintiff on demurrer having been signed in an action of covenant against the defendant as sequestrator, who was bound to pay over to the plaintiff all such sums as should be received by him in his character as sequestrator, in satisfaction of a debt owing to the plaintiff, the Court refused to refer it to the Master to compute the amount of damages to which the plaintiff was entitled. *Smith* v. *Nesbitt*, 420

RULE (TO DISCONTINUE).

See DISCONTINUE (RULE TO).

RULE (SERVICE OF).

See SERVICE (OF RULE).

SATISFACTION.

See PLEA, 2.

SCIRE FACIAS.

See FIERI FACIAS.
INQUISITION.

A writ of scire facias will issue to revive a judgment, although more than twenty years have elapsed since it was signed; if payments within that time have been made on account of it. *Williams* v. *Welch and Another*, 565

SECURITY FOR COSTS.

See STAYING PROCEEDINGS, 3.

The Court required a plaintiff, who, it was alleged, was in insolvent circumstances, to give security for costs; where it appeared that he had assigned, amongst other property, the debt for which the action was brought to two of his creditors in trust for the rest. *Perkins* v. *Adcock*, 270

SEQUESTRATOR.

See RULE (TO COMPUTE).

SERVICE (OF ORDER).

The rule of practice that an order must be drawn up and *served* before the other party is in a situation to take a fresh step, in order to operate as a stay of proceedings; applies to an order to amend on payment of costs to be taxed. *Normanby* v. *Jones*, 143

SERVICE (OF RULE).

See ATTACHMENT, 1.
AWARD.
ERROR, 1.

An affidavit of service of a rule to compute, stated the service to have been on A. B., "who acts as the attorney or agent of the defendant in this cause:" *Held* sufficient. *Patrick* v. *Richards*, 573

SET-OFF.

See WAIVER.

SHERIFF.

1. A sheriff who takes in execution a lease for years, has no right to remain on the premises for the purpose of executing an assignment, and putting the purchaser in possession. If he should do so, he is liable in trespass at the suit of the execution debtor, if in possession; although the premises have been sold and transferred.

Where a lease is taken in execution by the sheriff, the interest in it remains in the execution debtor until actual assignment to the purchaser. *Playfair* v. *Musgrove and Another*, 72

2. A sheriff having seized certain horses which were claimed by a third party, an interpleader order was made, that on payment of a sum of money into Court, and "possession money"

from the date of the order, the sheriff should withdraw from possession.

Held, that the sheriff had no right to detain the horses for the expense of their keep; but should have applied to the Judge to allow those expenses. *Gaskell* v. *Sefton the Younger*, 267

3. An attachment having issued against the sheriff for not bringing in the body, the same was ordered to be set aside, on payment of costs and perfecting special bail. Those terms not having been complied with, a habeas issued directing the coroner to bring up the body of the sheriff. The under sheriff then paid to the plaintiff the amount of the penalty of the bail bond (being double that of the debt), and costs: *Held*, that the plaintiff was only entitled to retain the sum indorsed on the writ and costs. *The Queen* v. *The Sheriff of Middlesex*, 472

4. A sheriff having applied for relief under the Interpleader Act, a Judge directed the goods to be sold, and the money paid into Court, to abide the event of an issue between the claimant and execution creditor. A verdict being found for the claimant, in the interpleader action against the sheriff for breaking and entering his dwelling-house, and seizing and converting the goods. The Court ordered that the breach of the declaration as regards the claimant with seizing and converting the goods, should be struck out. *Brown* v. *Richards*, 487

A writ to an under-sheriff, before whom a writ of inquiry is executed, issued under the 3 & 4 Vict. c. 24, s. 2, directed so as to call on the name of the sheriff, and amendable, that it ought to be changed to his own name. *Jones* v. *Watts*, 799

See Amendment, 2.

SHEWING CAUSE (IN FIRST INSTANCE).

See Costs, 1.

SIGNATURE OF COUNSEL.

See Counsel's Signature.

SLANDER.

See Pleas (several).

SPECIAL CASE.

See Amendment, 2.

SPECIAL JURY.

A cause having been set down for trial in Middlesex, and a rule obtained for a special jury, the parties agreed that the venue should be changed to London, and the cause tried by a special jury there, and that all costs occasioned by that arrangement should be costs in the cause. The cause came on for trial in London, and was referred to arbitration, the arbitrator to have the same power to certify as a Judge at nisi prius. The award was made on the 6th of August, and after the first four days of the following Term, the arbitrator certified for a special jury: *Held*, first, that the certificate was too late; secondly, that the successful party was entitled to the additional costs of the special jury occasioned by the change of venue from Middlesex to London. *Geeve* v. *Gorton*, 481

STAMP.

See Rejoinder.

STATUTE OF LIMITATIONS.

See Plea, 5.

STAYING PROCEEDINGS.

See Costs, 2.

1. The plaintiff agreed with the defendant to withdraw the record in an action on two cheques which stood ready for trial in the Exchequer, upon the terms that the defendant should pay the debt, interest, and costs, on or before a certain day, or in default of payment, that the plaintiff should be at liberty to sign judgment, and that a Judge's order should be given to secure payment. The Court of Exchequer having afterwards set aside the Judge's order, which had been made in pursuance of the above agreement, the plaintiff brought an action on the agreement in this Court: *Held*, that these facts formed no ground for staying the proceedings in the action in this Court. *Wade* v. *Simeon*, 27

2. A sub-lessee is a tenant of premises within the meaning of the stat. 4 Geo. 2, c. 28, s. 4, and is therefore entitled to a stay of proceedings upon payment into Court of the rent in arrear and costs. *Doe dem. Wyatt* v. *Byron*, 31

3. An action was brought by a wife against her husband, on a settlement deed, in the name of the trustee under that deed. The Court refused, on the application of the defendant, to set aside the proceedings, on the ground that the action was brought without the authority of the trustee; it appearing that an application had been made to the trustee to consent to her name being used, and an indemnity against costs offered to her, which she had refused, without assigning any reason. *Auster* v. *Holland*, 740

STAY OF PROCEEDINGS.

See SERVICE OF ORDER.

1. Where a rule nisi had been obtained for judgment as in case of a nonsuit, with a stay of proceedings, the Court set aside a rule to discontinue subsequently obtained. *Murray* v. *Silver*, 26

2. Where judgment and a summons to stay proceedings are due at the same time, the latter must be attended before judgment can be signed, even though it be such as an adverse order cannot be made on.

A summons to stay proceedings is waived by the delivery of a plea before the summons is due. *Barton* v. *Warren*, 142

SUBPŒNA.

See ESTOPPEL.

SUGGESTION.

See COURT OF REQUESTS.

SUNDAY.

See AFFIDAVIT, 2.

SURPLUSAGE.

See ARBITRATION. 2.
PLEA, 7.

TAXATION.

1. Where an action was brought by the plaintiff, an attorney in the country, to recover a bill of costs against the defendant, who was the solicitor to the Post-office, for business done in conducting the prosecution of an individual at the suit of the Postmaster general, for forging a Post-office order; for which purpose he had been employed by the defendant: *Held*, that the Court had no power to refer the bill for taxation; and that the fact that the plaintiff had debited the defendant with the whole of the charges, did not the less render it a bill for agency business. *In re Simons, and in a cause between Simons and Peacock*, 156

2. Where an attorney is retained by a surveyor acting under the Highway Act, the parties who contribute to a rate out of which the attorney's

bill is paid, are not "persons liable to pay the bill;" so as to entitle them to apply for its taxation, under the 6 & 7 Vict. c. 78. *In re Barber*, 244

3. An attorney on being retained to bring an action, gave the following undertaking: "Should the damages or costs not be recoverable in this action, under the circumstances, I shall charge you costs out of purse only." The plaintiff obtained a verdict, with 600*l.* damages, for which sum and costs, judgment was entered up. The defendant took the benefit of the Insolvent Act, and the dividend on his estate awarded to the plaintiff was 272*l.* odd. The Master, on taxation, allowed the attorney costs out of pocket only, but referred the matter to a Judge, who directed the taxation of costs out of pocket only. A second summons was taken out before the same Judge, to review the taxation, and dismissed. *Held*, first, that the party was not precluded from appealing to the Court; and, secondly, that the taxation was incorrect. *In re Stretton*, 278

TRAVERSE.

See REPLICATION, 6.

TRESPASS.

1 Trespass will not lie against a plaintiff who, without notice, takes a defendant in execution for a debt in respect of which the latter has been discharged under the Irish Insolvent Act.

But if the plaintiff maliciously sue out the writ, he is liable to an action on the case. *Ewart v. Jones*, 252

2. Trespass will not lie against a plaintiff or his attorney for suing out execution, and arresting thereon a defendant who has obtained an order for protection from process under the 5 & 6 Vict. c. 116. *Yearsley v. Heane and Hudson*, . . . , note (*a*), 265

TRIAL (POSTPONEMENT OF).

See CROWN, 1.

UMPIRE.

See ARBITRATION, 2.

UNDERTAKING (TO GIVE MATERIAL EVIDENCE).

See VENUE, 2.

VARIANCE.

1. In an action on a guarantee, the declaration stated a promise by the defendant that in the event of A. M. making default in payment of a sum of money, he the defendant would immediately on such default, pay the same to the plaintiff. In the guarantee itself, the terms were "in the event of A. M. making default, I will, immediately upon such default being made, *and a letter being sent to me addressed, &c., giving me notice of such default*, pay, &c.:" *Held*, that there was a material variance between the declaration and the guarantee; the former alleging an absolute promise to pay on default, while the promise in the latter was coupled with the condition of sending a letter, &c., which was a material qualification. *Higgins v. Dixon*, 124

2. "In consideration of advances made and to be made by T. C. and S. C.," "or by any other persons of whom their firm may from time to time consist, to F. we jointly and severally hereby guarantee to the said T. C. and S. C. the repayment of the said advances, and to indemnify them against any loss by reason of such advances, our liability not to exceed the sum of 1000*l.* This guarantee to be a continuing guarantee, and to

be a security to the said T. C. and S. C. to the extent of 1000*l.* as aforesaid, for the whole of any balance which may from time to time, or at any time, become due to the said T. C. and S. C., or to the persons for the time being constituting the firm of the said banking-house:" *Held*, that this guarantee disclosed a good consideration for the promise to pay past as well as future advances, the future advances having been made. T. C. and S. C. declared upon this guarantee, and alleged that past advances had been made, and that in consideration of the advances so made, and that the plaintiffs would from time to time make advances to F., the defendant and one H. jointly and severally guaranteed to the plaintiffs the repayment of the said last mentioned advances, that the said guarantee should be a continuing guarantee to the extent of 1000*l.* for the whole of any balance which might become due to the plaintiffs, or to the persons for the time being carrying on the said trade or business. The declaration then averred that advances were afterwards made by the plaintiffs to F.: *Held*, first, that there was a variance in the statement of the consideration, as it was the making advances by the plaintiffs, or any persons who might constitute the firm; secondly, that there was a variance in the statement of the promise, it being to pay what might be due to the plaintiffs, or those persons who might constitute the firm; thirdly, that those variances might be amended by a Judge sitting at nisi prius; fourthly, that a term in a special case that the Court should be at liberty to amend any part of the pleadings as they might think proper, gave no additional power beyond that possessed by a Judge at *nisi prius*. *Chapman and Another* v. *Sutton*, 646

VENUE.

See DECLARATION, 2.
SPECIAL JURY.

1. The 5 & 6 Wm. 4, c. 76, s. 109, places the cities therein named in the same position as if they had not been excluded by the 38 Geo. 3, c. 52, s. 10, from the operation of the 1st section of that act. *Cole* v. *Gane*, 369

2. The venue in an action for criminal conversation was laid in Middlesex, and having been removed to Somersetshire, was brought back on the usual undertaking to give material evidence in M. It was proved at the trial, that the plaintiff had taken lodgings in S. under an assumed name, and that the letter by which the landlady of the lodgings accepted his proposal to become her tenant, was sent to him in M. at a hotel where he was stopping; that he afterwards wrote a letter bearing a post mark such as a letter sent from M. would bear while stopping at the hotel, directing his apartments in S. to be prepared; that the plaintiff's wife met the defendant at those lodgings in S., where the adultery was committed: *Held*, by *Tindal*, C. J., *Maule*, J., and *Cresswell*, J., (*Erle*, J. dissentiente), that the evidence fulfilled the undertaking. *Held* also by the whole Court, that it was not necessary to shew that any part of the adultery had been committed in the county of Middlesex.

Query, whether the defendant was bound to produce the undertaking at the trial in order to raise the objection as to the insufficiency of the evidence. *Clarke* v. *Dunsford*, 618

3. The 7 & 8 Geo. 4, c. 29, s. 84, enables the owner of a fishery or his servants to take into custody any person unlawfully fishing therein. The plaintiff was fishing near a spot where P. had a private right of fishery, where the servants of P. seized the

plaintiff's net, and took him into custody, under a bonâ fide, but mistaken, belief, that the plaintiff was fishing in the fishery of P.: *Held*, that the defendants were entitled to the protection of the 7 & 8 Geo. 4, c. 29, and that the venue ought to have been laid in the county where the cause of action arose. *Hughes* v. *Buckland and Another*, 702

VERDICT.

On the trial of a cause before the sheriff, under a writ of trial, a verdict was taken by consent of the parties, subject to a reference. Owing to the absence of the referee from town, the reference could not be gone into. The plaintiff accordingly gave notice that he abandoned the former verdict, and that he should proceed to try the case de novo; which he accordingly did in the defendant's absence, and obtained a verdict: *Held*, that the second verdict was irregular, and must be set aside; and that the first ought not to stand, as it was subject to a reference, which had proved abortive, and which the sheriff had no power to order. *Harrison* v. *Greenwood*, 353

VERIFICATION.

See PLEA, 9.
REPLICATION, 5.

VESTING ORDER.

See PRISONER, 3.

VIDELICET.

See DECLARATION, 3.
REPLICATION, 6.

VI ET ARMIS.

In trespass for breaking and entering a dwelling-house, the allegation "vi et armis" does not imply a forcible entry. *Harvey* v. *Bridges and Others*, 55

WAGER.

See FEIGNED ISSUE.
LOTTERY.

WAIVER.

See JUDGMENT (AS IN CASE OF A NONSUIT), 3.
PLEA, 11.
PLEA (ISSUABLE).
STAY OF PROCEEDINGS, 2.

Where a defendant is under terms of pleading issuably, and one of the pleas is a set-off; obtaining an order for particulars of the set-off is a waiver of the objection that the pleas are not issuable. *Scott* v. *Watson*, 203

WARRANT.

1. A warrant of commitment of a bankrupt for not giving satisfactory answers, recited the issuing of a fiat "directed to her Majesty's Court of Bankruptcy for the Leeds district" against J. R.; and that J. R. duly surrendered "to M. J. West, Esq., one of the commissioners of the said Court authorized to proceed with the said fiat." It then stated several examinations before M. J. W., Esq., after "being duly sworn," and proceeded thus; "And whereas the said J. R. did on," &c. "pursuant to a summons issued by me at the request," &c. "of the assignees," &c., "appear before me the commissioner then acting in the prosecution of the said fiat," "to be examined," &c. "And I, W. Burge, Esq., the said commissioner, in execution of the powers," &c., "proceeded to examine the said J. R.," &c., "and the said J. R. being then duly sworn and required before me to make true answers," &c. The warrant then set out several questions and answers, and other adjournments and examinations, where the bankrupt was stated to be "duly sworn;" "which answers not being satisfactory," &c., "these are therefore," &c. "Given," &c., "at

the Court of Bankruptcy for the Leeds district," &c. Signed, "W. Burge, commissioner," (L. s.) *Held*, on motion for a habeas corpus, that the warrant was bad, as shewing that the bankrupt was sworn on his examination, contrary to the 8 & 9 Vict. c. 48, s. 1. *In re Ramsden*, 748

2. A warrant of commitment for non-payment of a poor rate should shew an adjudication by the same justices before whom the complaint is heard. *Ib.*

3. A warrant of commitment of a bankrupt for not giving satisfactory answers, stated that "a fiat in bankruptcy," "directed to her Majesty's Court of Bankruptcy for the Leeds district, was duly awarded and issued against Francis Ward;" "and whereas the said Francis Ward did, on," &c., "surrender himself to me, Martin John West, Esq., one of the commissioners of the said Court authorized to act in the prosecution of the fiat," &c. It then set out the examination and the questions and answers, and proceeded, "which answers of the said F. W. are not, nor any of them, satisfactory to me the said commismissioner," "these are therefore to require you," &c.

Held, upon motion for a habeas corpus to discharge the bankrupt, that the jurisdiction of the commissioner to make the order sufficiently appeared; although there are two commissioners in the Leeds district, and it was not stated that the fiat had been allotted to the commissioner in question, or that he was acting in the absence of the other commissioner, in pursuance of the rules and orders made by the bankrupt commissioners under the 5 & 6 Vict. c. 122, s. 70.

Held also, that it was not necessary to specify which of the answers were unsatisfactory; although there were some, that taken separately and apart from the rest, could scarcely be deemed so. *Ex parte Ward*, 756

WARRANT OF ATTORNEY.

1. More than a year having elapsed after judgment entered up on a warrant of attorney, the defendant agreed to waive the necessity of a scire facias: *Held*, that such agreement was no part of the defeasance or condition, and did not render the warrant of attorney void as against the defendant's assignees, for want of inrolment under the 3 Geo. 4, c. 39. *Harmer* v. *Johnson*, 38

2. A warrant of attorney, dated the 4th of April, 1844, was given by the defendant to the plaintiff, the defeasance to which stated it to be for securing 1300*l.* and interest on the 15th of April, and authorized the issuing of execution for the whole of the principal and interest then due, with costs, &c., in default of payment. At that time the defendant owed 514*l.* to the plaintiff, who was also liable as a surety for 237*l.* When execution issued, the amount of debt and liabilities was 1110*l.*, including bills accepted by the plaintiff for the accommodation of the defendant, after the giving of the warrant of attorney, some of which were not due. The amount levied was 1085*l.*: *Held*, that affidavits were admissible to shew the intention of the parties to have been, that the warrant of attorney should be a security for future liabilities, as well as for existing debts, not exceeding 1300*l.*; and also to shew that the accommodation acceptances had been given with that understanding.

The warrant of attorney was filed under 3 Geo. 4, c. 39, s. 1, on the 24th of April, 1844, with an affidavit stating that deponent "was present on the 4th day of April, 1844, and did see the within named W. H. R. sign, seal, and, as his act and deed, deliver the within warrant of attorney:" *Held*, that the affidavit sufficiently shewed that the warrant of attorney was executed within twenty-one days

of its being filed. *Henry Robinson* v. *William Henry Robinson*, 134

3. Where a charge of embezzlement was pending before a magistrate, who entertained doubts whether a partnership did not exist between the prosecutor and the accused party: *Held*, that a warrant of attorney given to secure the payment of the monies charged to be embezzled, the charge being afterwards withdrawn, was invalid; as at the time of giving it, there was a charge of a criminal nature pending, which it was calculated to bring to an end. *Ex parte George Critchley*, 527

4. A joint warrant of attorney having been given by two defendants, and one of them having been transported for life, the Court permitted judgment to be entered up against both, on an affidavit stating the conviction, and a certificate from the Home Office, certifying the transportation, and that no return of the convict's death had been made, and that by the practice of that office no return was made of a convict continuing alive; it being also sworn that the other defendant was still living. *Dalrymple* v. *Fraser and Dawes*, 611

5. "Signed, sealed and delivered, in the presence of H. Whittaker, 10, Lincoln's Inn, attorney for the said Lord Kensington, expressly named by him, and attending at his request, and I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him, and I hereby subscribe my name as a witness to the due execution thereof:" *Held*, a sufficient attestation within the provisions of the 1 & 2 Vict. c. 110, s. 9. *Lewis* v. *Lord Kensington*, 637

6. Writs in the new form do not require to be connected by continuances as writs under the old forms. On final process, one writ may issue in continuation of another at any time; but on mesne process, the writ in continuation must issue within twelve months after the issuing of the prior writ. *Harmer* v. *Johnson*, 38

7. Two persons executed a warrant of attorney, by which they authorized certain attorneys to appear "for us and each of us," and to receive a declaration "for us and each of us in an action of debt," &c., and to confess the same action, or else to suffer judgment, &c. to pass "against us," and to be thereupon entered up "against us and each of us," and after the said judgment shall be entered up as aforesaid, "for us and in our names and as our act and deed," to execute a release of errors. On an application to enter up judgment against one of the defendants, the Court held the warrant joint, and not joint and several, and therefore refused a rule for that purpose. *Dalrymple* v. *Fraser and Another*, 818

WITNESS.

See ESTOPPEL.

WRIT (CONTINUANCE OF).

See CONTINUANCE (OF WRIT).

THE END.

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